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MICHAEL BOGAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-615**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BOEING COMPANY,

Intervenor.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter IAM or the Union) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the National Labor Relations Board (hereinafter the Board) dismissing its General Counsel's complaint against Boeing Company (hereinafter Boeing).

OPINIONS BELOW

The opinion of the Court of Appeals (1a-23a),¹ is not yet officially reported. The decision and order of the Board (24a-94a), is reported at 214 NLRB 541 (1974).

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1978. On September 1, 1978, Mr. Justice Brennan entered an order extending the time for filing a petition for certiorari until October 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 294-295 (1972), this Court declared that a successor employer who "plans to retain" his predecessor's bargaining unit employees must "initially consult with the employees' bargaining representative before he fixes terms." The question presented is whether that obligation applies to a plan to retain on inferior terms.

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act as amended, 49 Stat. 452, 61 Stat. 140, 29 U.S.C. § 158(a)(1) and (5), and 159(a), provides as follows:

"Sec. 8(a) It shall be an unfair labor practice for an employer—

¹ The symbol "a", refers to the appendix, *infra*, in which the opinions of the court below, the Board and the Administrative Law Judge are reprinted. The supplemental appendix, *infra*, in which decisions constituting the matrix of the "plans to retain" doctrine are reprinted, is numbered sequentially and similarly designated "a".

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

STATEMENT OF THE CASE

The undisputed facts are detailed in the opinion of the court below (2a-8a).² The essentials, summarized briefly, are as follows: In 1970, Boeing bid to succeed Trans World Airlines (TWA) as installation support services contractor with National Aeronautical and Space Administration (NASA) at the Kennedy Space Center. There were 1,054 TWA employees in the bargaining unit performing these services, represented by IAM as exclusive bargaining agent. In its formal bid, Boeing made it abundantly clear that it desired, intended and planned to retain virtually all "incumbent contractor personnel" (3a-4a), citing the advantages of "continuity * * * effectiveness and economy [to] be achieved by retaining experienced and qualified incumbent personnel." (*Id.*)

At the same time, Boeing proposed to pay lower wages and fringe benefits for the same work than TWA had

² References succeeding a semicolon are to the decision of the Board or the Administrative Law Judge.

been paying (3a).³ Boeing stated that "[w]hile the staffing plan is based on retaining approximately 86 percent of the incumbent personnel," a satisfactory complement could be recruited from the local labor market (5a).

Boeing acted unilaterally in preparing and submitting its bid proposal to pay inferior wages and benefits (61a-62a). After NASA announced, on November 23, 1970, that Boeing had been selected as successor to TWA (5a), Boeing continued to maintain (n. 3, below) that terms and conditions of employment in the support services unit were fixed and governed by its preexisting "hardware contract" (61a). This pretermitted consultation and negotiation with IAM about initial terms and conditions of employment in the support services unit (5a). On March 11, 1971, NASA gave the support services contract to Boeing. Even before that date, Boeing had offered preferential employment to incumbent TWA employees on Boeing's unilaterally established inferior wage and benefit terms, which many predictably rejected (5a-7a, 23a; 57a-60a).

On IAM's charges, the Board's General Counsel issued a complaint alleging violation of Section 8(a)(5) and 8(a)(1), grounded in Boeing's failure to consult IAM before fixing initial terms and conditions of employment for the installation support services unit (7a).

³ Boeing based its wage and fringe benefit proposal upon the terms of its national contract with IAM, which also covered "hardware contracts" with NASA for the Center (3a). It was Boeing's legal theory, subsequently rejected by the Administrative Law Judge and the Board, that if Boeing obtained the support services contract, the unit performing those services would constitute an "accretion" to Boeing's existing "hardware" unit and that terms and conditions of employment would therefore be governed by the "hardware" contract (6a; 51a-54a).

DECISIONS BELOW

The court below approved the decision of a three to two majority of the Board (24a-27a) (Chairman, then Member, Fanning and Penello dissenting, 28a-39a), which adopted, on limited grounds, the recommendation of the Administrative Law Judge (40a-94a), that the complaint be dismissed (7a-8a). Dismissal was predicated upon construction of the *Burns* "plans to retain" exception (13a), as excluding plans which are coupled with lower wage rates or other inferior terms. The theory is that when the successor's "offer of employment is coupled with an announcement of reduced wages and benefits" his intention "to retain large numbers of his predecessor's employees is not likely enough to come to fruition" to constitute a "plan" within the meaning of *Burns* (14a, 19a, 26a). This reasoning is grounded on the premise that the *sine qua non* of an obligation to bargain under *Burns* is a justified claim by the putative bargaining agent "to represent the larger number of the successor's prospective employees" (18a). That is conceived to require "probable continuity of employment" (*id.*); assurance of actual "perpetuation of the incumbent work force" (19a). Absent such assurance, a successor employer's plan, desire or intention to retain the incumbent work force, no matter how unequivocal, is thought legally insufficient to ground a pre-takeover obligation to bargain.

On this reasoning, the Board majority and the court below rejected the literal and natural meaning of *Burns*. They bolstered rejection on the premise that to effectuate this Court's opinion as written would discourage successor employers from "commenting favorably upon the employment prospects of old employees" (15a, 21a-22a). To avoid this result without totally obliterating the exception, they transformed the obligation from consulting before fixing initial terms into an obligation to adhere to express or implied promises to retain on the same

terms (15a, 19a-20a, 23a, cf. 88a). Thus, the *Burns* exception was construed to mean that (23a):

"a successor employer need consult with an incumbent union with respect to initial employment terms prior to fixing them only when he has not evinced any intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents."

The Board, the Administrative Law Judge and the court below deemed themselves free to devise this policy-oriented transformation of *Burns* because they overlooked the decisional source and history of the exception and misconceived its function in the mosaic of the *Burns* opinion. The Administrative Law Judge asserted (88a): "the derivation of this statement in *Burns* is not clear * * *." In *Spruce Up II*, 209 NLRB 194 (1974), (161a-210a), upon which the decision in this case is grounded (8a, 13a-15a, 17a-18a), the Board majority said: "the precise meaning and application of the Court's caveat is not easy to discern" (209 NLRB at 195; 166a). The court below observed that "[t]he *Burns* exception * * * provides minimal guidance" (n. 41, 16a).

ANTECEDENTS OF THE BURNS EXCEPTION

As the court below impliedly recognized (18a-19a), the *Burns* exception is addressed to the nature of the nexus between a prospective successor employer and his predecessor's employees adequate to ground a pre-hire 8(a)(5) or (1) bargaining obligation. The Board addressed precisely that question in *Chemrock Corp.*, 151 NLRB 1074 (1965); 95a-114a. It there held that a prospective successor who "indicated a desire to hire" his predecessor's drivers, but "only * * * at a [lower wage] rate" than his predecessor had been paying (*id.*, at 1076, 1085; 97a, 110a-111a), became the "employer" of the drivers for 8(a)(5) and (1) purposes, and was required to recognize and bargain with the drivers' exclusive bar-

gaining agent about initial terms and conditions of employment (*id.*, at 1076-1081; 98a-104a). The Board explained (*id.* at 1080-1081; 103a-104a):

"It is quite clear that when [the prospective successor] invited the drivers as a group to confer with it about their continuity of employment and rates of pay in the 'employing industry' to which it was succeeding, *it was acting in an employer capacity*, and this is so regardless of whether the employees were yet [the successor's] employees in a literal sense. Moreover, the subjects about which [the successor] engaged in direct dealings with the drivers, though concerned with terms and conditions of employment that were not to be applicable until [the successor] actually took over the plant, involved nonetheless matters as to the negotiation of which the employees had a legitimate right and interest to be represented by their bargaining agent." *Having itself elected during the interim period referred to above to deal with the employees on matters properly a subject for collective bargaining*, [the successor] could not at the same time lawfully disregard the employees' statutory right to bargain through their then currently duly designated bargaining representative."

* * *

* * *. In this case, it is apparent that when [the successor] invited the drivers as a group to confer with it concerning the terms and conditions on which it would continue their employment, *it at least contemplated the possibility of taking over as a unit the entire crew of drivers to perform the same work they had done in the past.*" (Emphasis added.)

The Board affirmed and applied this *Chemrock* holding in *Spruce Up I*, 194 NLRB 841 (115a-160a), which issued on January 5, 1972, shortly before the oral argument in *Burns* (January 13, 1972), and more than five months before the *Burns* decision issued (May 15, 1972). In *Spruce Up* the prospective successor, before take over,

likewise offered to retain his predecessor's barbers, but "at a specified rate of commission, which was in many cases less than their existing rate * * *." 194 NLRB at 844, col. 1 (126a). The Board adopted the holding of the Administrative Law Judge that (*id.*, at 846, col. 2 (135a)):

"where . . . an employer who is about to acquire a going business manifests an intent to retain his predecessor's employees, they become at that point his employees for the purpose of the application of Section 8(a)(5), and he is obligated to bargain with a union which is the[ir] statutory representative. . . ."

By passing the union which was the barbers' exclusive bargaining agent by fixing inferior initial employment terms therefore violated Section 8(a)(5) and (1) of the Act.

The language of the *Burns* exception (406 U.S. at 294-295) strikingly parallels the quoted passage from *Spruce Up I*:

"... [when] it is perfectly clear that the new employer plans to retain all of the employees in the unit . . . it will be appropriate to have him consult with [their] bargaining representative before he fixes terms."

That parallel, the juxtaposition of timing and the function of the exception in the *Burns* opinion, provide strong ground for inference that *Spruce Up I* was its source. Thus, both the preceding paragraph (11a-12a) and the succeeding sentence (13a), in the *Burns* opinion stress the nonexistence, normally, of a pre-takeover bargaining obligation because of the absence of an employer-employee relationship. If the Union's right to be consulted depended upon its representation of a majority of the successor's employees, such right could not arise before an actual employer-employee relationship was established. If there was an exception, in which a pre-takeover bargain-

ing obligation existed prior to establishment of an actual employer-employee relation, it was necessary to say so. It is but reasonable to infer that in limning the exception this Court envisioned and adopted that which already existed in Board law.

Other indicia support that inference. The *Burns* Court was aware of but did not disturb *Chemrock*, 406 U.S. at 280, n. 5.⁴ And while *Burns* (n. 32, 12a)

"overturned a line of Board decisions requiring a successor employer *always* to bargain with the incumbent union before instituting employment terms different from those prevailing under the predecessor's contract" (emphasis added),

that "line" conspicuously did *not* include *Chemrock* or *Spruce Up I*. More specifically, this Court's manifest disapproval of the Board's rule insofar as it shackled a potential successor to his predecessor's work force and terms and conditions of employment by operation of law (406 U.S. at 287-288, 289, 291, cf. 279, n. 3, 280, n. 5), did not even remotely imply disagreement with the *Chemrock-Spruce Up* principle that prospective successors who are satisfied with the composition of the work force and voluntarily elect to attempt to retain the incumbent employees, thereby treating them "in an employer capacity" (*Chemrock*, p. 7, *supra*), are not simultaneously free to divest that work force of the protection of collective representation. "The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own * * * conduct" (n. 14, 21a). For the same reason, imposition of a duty to bargain based on the successor's "voluntar[y]" plan to take over the bargaining unit "largely intact" (*Burns*, 406 U.S. at 287), would have

⁴ *Chemrock* was cited "But cf." to the proposition that a successor employer might voluntarily "assume[]" an obligation to hire all the predecessor's employees.

no adverse effect on alienability. Cf. 16a-17a. Of course, if *Chemrock-Spruce Up* is the source of the *Burns* exception, changing terms unilaterally is not avoidance but violation of the bargaining obligation.

REASONS FOR GRANTING THE WRIT

1. The uncertainty expressed by those who have deemed themselves compelled to recast the *Burns* exception, p. 6, *supra*, indicates the necessity for clarification. Further, two Board Members and the General Counsel at the time the *Burns* exception was initially considered vigorously disagree with the majority's construction.

In an official report,⁵ then General Counsel Peter G. Nash concluded that

"determination of whether a successor 'plans to retain all' within the meaning of *Burns* rests on an evaluation of evidence of the successor's intentions to employ or not employ unit personnel—e.g., their qualifications, experience, and suitability as employees—apart from its intentions as to the terms and conditions of their employment. So it was concluded that a successor who manifests a willingness to accept the unit complement as its employees cannot avoid an obligation to bargain about initial working conditions simply by making employment of the unit dependent upon acceptance of a unilateral establishment of working conditions. To interpret the *Burns* 'plans to take all' statement as privileging the unilateral establishment of the very employment conditions on which there is a duty of initial consultation would, it seemed to us, make the statement meaningless."⁶

⁵ Labor Relations Yearbook, 1973 (BNA, 1974), pp. 167-168.

⁶ Nash reiterated that position in a subsequent article, *Successorship in the Light of Burns*, 7 Ga. L. Rev. 664, 681 (1973):

[Footnote continued on page 11]

The dissenting members in this case replied to the majority as follows (34a):

"Our colleagues in the majority in effect would transform an incoming employer's 'plans to retain' his predecessor's employees, which is the *Burns* test, into 'a commitment to hire or an actual advance hiring of such employees,' as found by the Administrative Law Judge. [88a]. The latter meaning is wholly different and is destructive of the 'plan to retain' standard. A 'commitment to hire or an actual advance hiring' is an overt entry into a contract of employment between the employer and employee with nothing left to consummate the engagement except reporting for work at a future fixed time. It is, albeit informal, an offer and acceptance of employment, and hence a completed contract."

"A 'plan to retain,' on the contrary, necessarily precedes any 'commitment to hire or an actual advance hiring' A plan to retain simply signifies that the incoming employer proposes to look to the incumbent employees as the primary source of his work force. That plan is the stage preliminary to the employer's approach to the incumbent. It precedes, and is independent of, any ensuing commitment to hire or actual advance hiring. Once the subsequent commitment or actual advance hiring is made, it is no longer a plan; it is a consummated transaction. It is therefore self-contradictory to equate the plan with the commitment. The former

⁶ [Continued]

"[C]onditioning * * * employment [with a successor] merely upon the acceptance of changed terms and conditions of employment would not seem to be sufficient for the employer to avoid the Court's dictum in *Burns*. A contrary conclusion would permit an employer to avoid his bargaining obligation concerning initial working conditions simply by making employment in his unit dependent upon the acceptance of a unilateral establishment of working conditions. So to interpret *Burns* would be to render meaningless the bargaining obligation."

precedes the latter; it is not coterminous with it.”
[Emphasis added.]

The dissenters also demonstrated that transforming a “plan to retain” into probable retention destroys the only statutory purpose the exception could serve (35a-36a):

“Our separate dissents in *Spruce Up*, *supra*, dealt with the central fallacy of our colleagues’ analysis, i.e., as Boeing’s plan to retain the incumbents was ‘simultaneously and inextricably linked in Boeing’s proposals’ with the lower terms it proposed to offer them, the existence of the plan did not in the language of *Burns* impose upon Boeing the obligation to ‘initially consult with the employees’ bargaining representative before . . . [the incoming employer] fixes terms.’ In response, it was said then, and we reiterate now:

The Court [in *Burns*] said nothing about a conditional intent to hire. The majority are attempting to revise substantially what the Court said, for their view, would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he “plans” to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity.

The majority’s contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining obligation over the establishment of the successor’s initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union

had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear ‘the mediatory influence of negotiation’ where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end.” [Footnotes omitted.]

2. The construction of the majority, approved below, is incompatible literally with the *Burns* exception. To make the existence of a “plan[] to retain” depend on its prospects of fruition is logically a non-sequitur. The fallacy is compounded, not aided, by invoking the “perfectly clear” qualification (17a), for those words syntactically refer to and modify the existence of a plan, vel non, not its feasibility. Furthermore, if the Court had envisioned “probable continuity” (18a) rather than manifest intention as the controlling factor, the draftsman would undoubtedly have used the words “will probably” instead of “plans to”.

The approved construction, as the court below admits (19a), virtually eviscerates the exception for it deprives the predecessor’s employees of the benefits of collective bargaining precisely and only when it is needed —i.e., when the successor proposes to employ them under substantially worse terms and conditions than those prevailing—and guarantees collective bargaining only when it is not needed, —i.e., when the successor proposes no substantial change.⁷ In addition, as former General Counsel Nash pointed out, the limitation enables a successor to evade the obligation to bargain about initial terms for a work force which he intends to compose mainly out of his predecessor’s employees merely by coupling his

⁷ “To be sure, in view of the substantial harmony existent in the parties’ positions, only minor adjustments in initial terms may then remain to be negotiated, and it must be acknowledged that compulsory bargaining usually yields greater returns where labor-management differences are of more appreciable magnitude.” (19a).

announcement of intent to retain them with a unilateral wage reduction. It is mind boggling to assume that this Court would have taken pains to draft a virtually self-defeating exception.

The attempt of the court below (n. 52, 22a) to minimize the effect of the evisceration: "nonapplicability of the *Burns* exception does not substantially impair the ability of the incumbent employees to ensure suitable terms for the successor employment"; "a bypass of initial-terms bargaining consistent with the Board's reading of *Burns* does not lock indefinitely the carried-over workers into conditions not to their liking"; "if incumbents are retained they can at that point endeavor collectively to improve their lot", is counter-productive. The listed consequences all follow from the sentence *succeeding* the exception. If this Court deemed those protections sufficient, the sentence at issue would not have been written.

3. The construction of *Burns* in question here goes to the heart of Section 2(3) analysis as it applies to Sections 8(a)(5) and (1). In *Chemrock and Spruce Up I* the Board followed *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), in reasoning that where a prospective successor recognizes and plans to preserve the incumbent employees' "existing employee status," the conditions of the relationship are such as to "require [collective bargaining] protection." *Chemrock, supra*, 151 NLRB at 1077-1078 (98a-104a). In construing *Burns* to deny protection, the Board majority and the court below repudiated, *sub silentio*, the teachings of *Phelps-Dodge* and *Hearst*.

The Board majority's approach sends the law galloping off in a new, complex and forbidden direction. Instead of focusing upon the nature of the nexus between the would-be successor and the incumbent workforce which triggers the pre-takeover duty to bargain (*Spitzer Akron*,

Inc. v. NLRB, 540 F.2d 841, 844-845 (6 Cir., 1976), cert. denied 429 U.S. 1040),⁸ the Board and the courts now make liability turn on whether the successor violated a commitment or broke his word. (n. 40, 15a). This line of analysis would seem to invade the area of enforcement of promises and protection of "employer-generated expectations" (19a-20a, n. 52, 22a) which Congress foreclosed to the Board. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452-453 (1957); *Smith v. Evening News Ass'n*, 371 U.S. 195, 199 (1962).

4. The policy objective of the majority's construction—to avoid discouraging "employers from commenting favorably on the employment prospects of old employees" (14a-15a, 21a-22a)—is based on speculative assumptions which are in any event irrelevant. In the first place, as this Court observed in *Burns*, 406 U.S. at 291:

"In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil."

The court below conceded (21a):

"It seems rather evident that in *some* instances a new employer desirous of changing prevailing employment terms may feel compelled to reveal his retention plans, notwithstanding a resultant obligation to bargain. But, in the Board's view, as we understand it, the successor *more commonly* may endeavor to conceal, or to at least postpone publicity on, reemployment objectives in order to avoid the onus of bargaining during the usually difficult period of takeover, * * *." (Emphasis added.)

⁸ In *Spitzer Akron*, the court said (*id.*):

"We construe *Burns* as relating to the timing of the changes—whether they predate or postdate the commencement of the duty to bargain. As soon as the duty to bargain arises, the successor company cannot institute changes without consulting with the union."

But no probative evidence or Board experience is cited to support "the view" so imputed to the majority, and we are aware of none. Indeed, it is more reasonable to suppose that the instability (cf. 22a), resulting from "concealment" may so adversely affect the employer's interest in retention as to "more commonly" impel disclosure. To the extent that the *Chemrock-Spruce Up I* rule may deprive employees of "early appraisal of their retention prospects" (21a), that disadvantage may well be outweighed by the advantages gained through collective bargaining over the proposed reduction in wages and lessening of benefits where retention prospects are revealed.

In any event, speculations such as these are irrelevant, for they cannot justify discarding the natural and normal meaning of the language of this Court. That language effectuates "[t]he congressional policy manifest in the Act [which] is to enable the parties to negotiate." *Burns*, 406 U.S. at 288. Congress trusted *that* policy to promote stability in labor relations. The Board is not licensed to repudiate that policy to increase the likelihood that successor employers will issue favorable forecasts of employment prospects for incumbent employees. The Act is not "a charter for the National Labor Relations Board to act at large" (*Labor Board v. Insurance Agents*, 361 U.S. 477, 490 (1960)) to enhance the economic security of either employees or employers.

Nor does the brevity of this Court's statement excuse deference by the court below to the majority's misconstruction (n. 41, 16a). As another panel of that court recently stated:

"What is involved in this case is both the meaning and the effect of the language of a Supreme Court opinion. We agree with the Third Circuit that the resolution of this type of question does not require the same type and degree of deference to administra-

tive discretion as was involved in *American Bible Society v. Blount*. [446 F.2d 588, 596-98 (3d Cir. 1971)]."

Standard Rate & Data Service, Inc. v. United States Postal Service, No. 77-1848, U.S. App. D.C., decided July 14, 1978, slip. op. 9.

5. The need for clarification is enhanced by the importance of the issue in the field of successorship law, to which this Court has devoted so much attention. Both in principle and in volume of transactions affected, it is vital to employers, employees and unions, and to the Board and reviewing courts, to know whether the *Phelps-Dodge-Hearst* approach survives *Burns*. Certiorari should be granted to resolve that issue.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1056

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BOEING COMPANY, INTERVENOR

Petition for Review of an Order of the
National Labor Relations Board

Argued November 1, 1976

Decided June 13, 1978

Mozart G. Ratner, with whom *Plato E. Papps* and
Denis Gordon were on the brief, for petitioner.

Peter Carre, Attorney, National Labor Relations
Board, with whom *John S. Irving*, General Counsel, *El-
liott Moore*, Deputy Associate General Counsel, and *Robert
Sewell*, Attorney, National Labor Relations Board, were
on the brief, for respondent.

Before LEVENTHAL, ROBINSON and WILKEY, *Circuit
Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Petitioner, International
Association of Machinists and Aerospace Workers, AFL-

CIO (IAM), complained to the National Labor Relations Board that the Boeing Company, as a successor employer, unlawfully refused to bargain with IAM over the initial terms and conditions of the successor employment. The Board interpreting Supreme Court pronouncements on the subject,¹ concluded that Boeing had no clear plan to incorporate as a majority of its own workforce employees of the predecessor employer²—a prerequisite to an obligation to bargain with incumbent employees over initial employment terms³ and the litigation is now before us for review of the decision and order of the Board dismissing IAM's complaint.⁴ We accept the Board's construction and application of Supreme Court doctrine on the duty of a successor employer to negotiate with an incumbent union before fixing such terms and accordingly affirm.

I

For seven years prior to March 31, 1971, Trans World Airlines (TWA), pursuant to contract, performed installation support services for the National Aeronautical and Space Administration (NASA) at the Kennedy Space Center. These services included test support management, plant engineering and maintenance, and logistical functions relating to NASA's utilization of the Center as a principal space-launch site. Since February, 1964, TWA had recognized IAM as the exclusive bargaining representative of the employees performing such services at the Center; and as of March 7, 1971, 1,054 of these employees were covered by an agreement between IAM

¹ See Parts II-III *infra*.

² *Boeing Co.*, 214 N.L.R.B. 541 (1974). Members Fanning and Pannello dissented.

³ See text *infra* at note 34.

⁴ Our jurisdiction rests on § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (1970).

and TWA for an effective term extending from January 28, 1970, through the end of 1971. The agreement was a company-wide contract encompassing all TWA operations in the Nation and by its terms was governed by the Railway Labor Act.⁵

On June 30, 1970, NASA invited bids for an undertaking to furnish essentially the same installation support services as those previously supplied by TWA.⁶ The term of the undertaking was to be one year commencing April 1, 1971, subject to extensions for successive one-year terms at NASA's option. In response to the invitations, proposals were submitted to NASA by TWA, Boeing and five other companies. The labor costs specified in Boeing's principal bid were based specifically upon the wage rates and fringe benefits stipulated in its existing national agreement with IAM, which also applied to Boeing's "hardware contracts" with NASA for the Center.⁷ These costs were substantially below those set by TWA's preexisting agreement with IAM for the installation support service unit.

NASA's invitation required bidders to explain their recruiting plans, including the "approximate number," by type, of existing employees to be hired. Boeing proposed to acquire 85.6% of its total work force for the operation from incumbent employees. This figure was derived after

⁵ 45 U.S.C. § 151 *et seq.* (1970).

⁶ Among other minor changes, mail and distribution services affecting 51 unit employees were eliminated. The assumption of that work by a new contractor gave rise to other litigation in this court. *IAM v. NLRB*, 162 U.S.App.D.C. 138, 498 F.2d 680 (1974).

⁷ Boeing has had various "hardware contracts" with NASA at the Center dating from 1952. Under these agreements Boeing was responsible for "launch support services," usually involving research and testing, associated with particular missile projects. The programs overlapped while earlier enterprises were phased out and new programs initiated. During these transition periods, employees were transferred between projects.

computing the number of Boeing employees who would transfer to the operation, the number to be recalled from layoff from Boeing employment in the area, and the number with known talent available in the area for employment. Boeing stated that its staffing proposal "recognize[d] the desirability of retaining incumbent contractor personnel to provide continuity of functional support,"⁸ and reported that its "analysis indicate[d] that effectiveness and economy can be achieved by retaining experienced and qualified incumbent personnel."⁹ Boeing's proposition repeatedly noted a need for continuity and its intent to hire incumbent employees,¹⁰ but observed that "[w]hile the staffing plan is based on retaining approxi-

⁸ *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 543.

⁹ *Id.*

¹⁰ Boeing proposed a lengthy baseline phase-in plan, one criterion of which was that "Boeing can and will staff the majority of the total work force from the incumbent contractor." *Id.* Additionally, Boeing's industrial relations chief at the Center declared that Boeing expected to hire a work force of approximately 1,000 employees, of whom it proposed to recruit "[a]ll" the TWA personnel "we could get," *id.*, not less than 86% and "closer to 100 percent," *id.* The proposal outlined detailed selection procedures stressing retention of incumbents, and Boeing announced to the press its intention to obtain the bulk of its workforce from incumbent employees. Newspapers circulating in the county in which the Center is situated reported that Boeing would hire a "majority" or a "large percentage" of TWA incumbents, *id.*, and Boeing was quoted as saying that it "want[ed] to upset the community as little as possible." *Id.* At Boeing's first meeting with IAM in late November, 1970, and at their second meeting on December 4, 1970, Boeing indicated to IAM that it would retain most of the TWA employees. During phase-in of the project, Boeing's employment supervisor told IAM "that we desire[] to employ in essence most of our required employees from the ranks of the incumbent contractor," *id.*, and Boeing informed TWA at a meeting on November 30, 1970, that "most of [the TWA employees] would be hired," *id.* TWA officials reported that Boeing "hoped to hire the majority[:]; . . . [it] desired to hire as many TWA people as possible," *id.*, and on December 1, 1970, TWA advised its employees that "Boeing is interested in hiring the majority of [TWA] employees" at the Center. *Id.*

mately 86 percent of the incumbent personnel, [Florida State Employment Service] data indicated that the local labor market is sufficient in both skills and number to provide the staffing requirements of this contract.¹¹

On November 23, 1970, NASA announced that it had selected Boeing as the party with which it would negotiate a contract to provide the installation support services at the Center. Subsequently, Boeing requested a meeting with IAM to discuss the company's bid, and at the meeting, on December 4, 1970, Boeing emphasized that its proposal to NASA was based on its current "hardware contract" at the Center. At an internal meeting on the next day, IAM officials agreed that they could not accept Boeing's plan to apply its existing contract with IAM to installation support service employees because that would result in a reduction in wages and benefits for such of them as were incumbents.¹² IAM promptly communicated its decision to Boeing and NASA, indicating that IAM would insist on perpetuation of the agreement with IAM and TWA for these employees.

Despite vigorous protests by TWA and IAM, NASA contracted with Boeing for the installation support serv-

¹¹ *Id.* at 549 (decision of administrative law judge). Boeing consulted the Florida State Employment Service and was notified in August, 1970, that qualified personnel in the desired classifications could readily be obtained from available manpower in the county. To survey the local market, Boeing advertised in a local newspaper on July 26 and August 7 for applicants for employment on the project and received numerous affirmative responses.

¹² After occurrence of the events leading to this litigation, the Service Contract Act, 41 U.S.C. §§ 351 *et seq.* (1970), was amended to provide that no successor government contractor may pay its employees less than the wages and fringe benefits set forth in the previous contractor's collective bargaining agreement. Service Contract Act Amendments of 1972, Pub. L. No. 92-473, § 3(b), 86 Stat. 789, 41 U.S.C. § 353(c) (Supp. II 1972); see *Boeing Co. v. IAM*, 504 F.2d 307, 311-312 & n.7 (5th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1570, 43 L.Ed.2d 779 (1975). The amendment was not made retroactive. *Id.*

ices on March 11, 1971. On the day following, IAM requested recognition by Boeing and again urged adoption of the TWA-IAM collective bargaining agreement. Boeing replied on March 19 that it recognized IAM as the representative of the employees on the assumption that they would become an accretion to the unit already covered by the Boeing-IAM contract rather than a distinct unit.¹³ Boeing predicted that IAM would lack majority representation of the installation and support service workforce, and indicated that the Boeing-IAM contract would be implemented without change.

On April 1, 1971, Boeing began performance of the contract with a workforce of 970, including 380 TWA incumbents, 138 Boeing employees—transferred or recalled from layoff, or formerly Boeing personnel—450 outsiders and two employees unidentified as to source. Each hourly employee arriving for work on and after April 1 was given a copy of the Boeing-IAM agreement.

As the Boeing-IAM national agreement was to expire on October 1, Boeing and IAM commenced negotiations on or about August 3, 1971 for a replacement. On November 12, 1971, the parties entered into a new nationwide agreement effective from December 13, 1971, through October 1, 1974, with a provision for automatic yearly renewal. Throughout the negotiations, each side maintained its legal position on the applicability of the TWA-

¹³ In adjudicating IAM's claim of unlawful unilateral successor conduct, the administrative law judge observed that if, as Boeing maintained, the appropriate unit were to consist of the installation support service employees in combination with employees already engaged pursuant to Boeing's current hardware contracts with NASA, terms and conditions for all such employees would have been governed by the existing Boeing-IAM agreement; but the judge regarded the accretion principle inapplicable in the circumstances of the case. *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 558-559 (decision of administrative law judge).

IAM contract to the installation support service unit at the Center.¹⁴

On May 10, 1973, the Board's General Counsel issued a complaint, upon charges filed by IAM, alleging a violation of Section 8(a)(5) of the National Labor Relations Act¹⁵ arising from Boeing's failure to consult IAM on the initial terms and conditions of employment for the installation support services unit.¹⁶ An administrative law judge recommended that the complaint be dismissed in its entirety.¹⁷ Relying on a number of factors, the judge rejected IAM's contention that Boeing had a "perfectly clear" plan to retain a substantial majority of incumbent employees¹⁸—a plan that would have created an obligation on Boeing's part, under the Supreme Court's *Burns* holding,¹⁹ to consult with IAM before setting initial employment terms.²⁰ Although the Board agreed with the administrative law judge's conclusions and

¹⁴ IAM filed grievances and sought to compel Boeing to arbitrate under the IAM-TWA agreement. The issue was resolved against IAM in a suit under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1970), filed by Boeing for a declaratory judgment that it was not bound by that agreement. *Boeing Co. v. IAM*, *supra* note 12. In *IAM v. Hodgson*, 169 U.S.App.D.C. 142, 515 F.2d 373 (1975), IAM failed in its suit for damages under the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* (1970 & Supp. II 1972), as amended by Act of Apr. 21, 1976, Pub. L. No. 94-273, § 29, 90 Stat. 380, and Act of Oct. 13, 1976, Pub. L. No. 94-489, §§ 1-2, 90 Stat. 2358.

¹⁵ 29 U.S.C. § 158(a)(5) (1970).

¹⁶ The complaint also asserted violations of §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3) (1970), which are not pertinent here.

¹⁷ The decision of the administrative law judge is appended to that of the Board. *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 545.

¹⁸ *Id.* at 559-560.

¹⁹ *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972).

²⁰ See Part II *infra*.

adopted his recommended order, it expressly chose to ground its decision solely on the reasons set forth in its *Spruce Up* opinion²¹ as applied to the facts of the instant case.²² The Board's order was followed by the petition to this court for review.

II

An employer's collective bargaining obligation derives from Section 8(a)(5) of the National Labor Relations Act, which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)] of [the Act]."²³ Section 9(a) provides in pertinent part that "[r]epresentatives designed or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . ."²⁴ By conjunctive operation of these two sections, a union representing a majority of the employees in an appropriate bargaining unit may compel the employer to negotiate with respect to the terms and conditions of employment applicable to that unit.

In *Burns*,²⁵ the Supreme Court considered the impact of employer succession on the bargaining status of a union previously selected by the predecessor employer's labor force. Like the case before us, *Burns* involved a succession to duties under a service contract; Burns Interna-

²¹ *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced per curiam on other grounds, 90 L.R.R.M. 2525 (4th Cir. Sept. 16, 1975).

²² *Boeing Co.*, supra note 2, 214 N.L.R.B. at 541 (with Members Fanning and Panello dissenting).

²³ Supra note 15.

²⁴ 29 U.S.C. § 159(a) (1970).

²⁵ *NLRB v. Burns Int'l Security Servs., Inc.*, supra note 19.

tional Security Services, Inc., had replaced Wackenhut Corporation, which for five years had provided plant-protection services for Lockheed Aircraft Service Company at an airport. Burns retained 27 of the Wackenhut guards and completed its workforce with 15 of its own transferrees [sic] from other Burns locations. Burns refused to deal with the United Plant Guard Workers of America (UPG), which less than four months earlier had been certified after a Board-supervised election as the exclusive bargaining representative of Wackenhut's employees. UPG demanded that Burns recognize it as the representative of the Burns workforce at the airport and that Burns honor the UPG-Wackenhut collective bargaining agreement.

Addressing Burns' alleged duty to negotiate with the union,²⁶ the Court held that when a bargaining unit is left undisturbed by employer succession and a majority of the unit's employees hired by the new employer are already represented by a union as the recently certified bargaining agent, an order directing the employer to bargain with the union implements wholesomely the express mandates of Sections 8(a)(5)²⁷ and 9(a)²⁸ of the Act.²⁹ But, the Court held, assumption of Wackenhut's

²⁶ Whether a new employer must assume the responsibilities of his predecessor will depend on what obligations are at issue. A new employer may be a "successor" for some purposes and not for others. See *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 262-263 n.9, 94 S.Ct. 2236, 2243-2244 n.9, 41 L.Ed.2d 46, 56-57 n.9 (1974); *IAM v. NLRB*, 134 U.S.App.D.C. 239, 244, 414 F.2d 1135, 1140, cert. denied, 396 U.S. 889, 90 S.Ct. 174, 24 L.Ed.2d 163 (1969) (concurring opinion); *Boeing Co. v. IAM*, supra note 12, 504 F.2d at 317.

²⁷ Quoted in text supra at note 23.

²⁸ Quoted in text supra at note 24.

²⁹ 406 U.S. at 279, 92 S.Ct. at 1577, 32 L.Ed.2d at 68. Reading §§ 8(a)(5) and 9(a) together, the Court ruled that the incumbent union could have compelled Burns, the successor employer, to negotiate if indeed the union had been the representative of a majority

collective bargaining contract did not follow from any duty on Burns' part to bargain since by the express terms of Section 8(d) of the Act a bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession."³⁰ That result was reinforced, the Court said, by the practical importance of allowing a successor employer to alter the structure of a

of the employees in an appropriate unit. *Id.* at 277, 281, 92 S.Ct. at 1577, 1579, 32 L.Ed.2d at 67, 69; see, e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 n.6, 94 S.Ct. 414, 425 n.6, 38 L.Ed.2d 388, 402 n.6 (1973) ("because the purchaser is not obligated by the Act to hire any of the predecessor's employees [citing *Burns*] the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor or by any order tied to the continuance of the bargaining agent in the unit involved [citing *Burns*]"); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir.), cert. denied, 429 U.S. 921, 97 S.Ct. 318, 50 L.Ed.2d 288 (1976) (*Burns* identified as a significant factor in determining a successor's duty to bargain "the permissibility of assuming the continued existence of a union majority"); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975) ("more than half of Daneker's production employees had worked for its predecessor"); *Toma-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027 (7th Cir. 1969) (successor began operations with 24 drivers and maintenance employees, 14 of whom had worked for the predecessor); *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 611 (9th Cir. 1977) ("absent a refusal to hire because of anti-union animus, a majority of the work force of the purchasing employer in the unit [must] be former employees of the seller in that unit").

Despite the intimation in *Golden State Bottling Co.*, *supra*, that *Burns* recognizes a successor's duty to bargain only when he hires a majority of his predecessor's employees, the relevant ratio—suggested by the language in *Burns* itself, see text *infra* at note 33 and 406 U.S. at 277, 281, 92 S.Ct. at 1577, 1579, 32 L.Ed.2d at 67, 69—is not the percentage of the predecessor's employees enrolled by the successor but the percentage of the successor's work force populated by those employees. See cases cited *supra*. This is true because the question to be resolved in light of § 9(a) is whether the incumbent union represents a majority of the successor's employees. See text *supra* at notes 24-25; *Boeing Co. v. IAM*, *supra* note 12, 504 F.2d at 319 & n.18, 320 & n.20, 321.

³⁰ 406 U.S. at 282, 92 S.Ct. at 1579, 32 L.Ed.2d at 70, quoting § 8(d), 29 U.S.C. § 158(d) (1970).

moribund business beyond the confines of a predecessor's labor agreement, as well as by the corresponding value to a union of an unshackled ability to negotiate a new contract with a more prosperous successor firm.³¹

The Court then proceeded to hold that ordinarily a successor employer may set his initial terms and conditions of employment without bargaining with the incumbent union:

Although *Burns* had an obligation to bargain with the union concerning wages and other condi-

³¹ 406 U.S. at 287-289, 92 S.Ct. at 1582-1583, 32 L.Ed.2d at 72-74. The Court observed that if the successor were inhibited by the former employer's contract with the union,

[i]t would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. *Burns* would not have been free to replace Wackenhut's guards with its own except as the contract permitted.

Id. at 288, 92 S.Ct. at 1582-1583, 32 L.Ed.2d at 73 (footnote omitted).

We note, however, that if the successor employer refuses to hire his predecessor's employees because of their union membership or activity, or to avoid recognition of the union, he violates § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). See *Howard Johnson Co. v. Hotel & Restaurant Employees*, *supra* note 26, 417 U.S. at 262 n.8, 94 S.Ct. at 2243 n.8, 41 L.Ed.2d at 56 n.8; *NLRB v. Burns Int'l Security Servs.*, *supra* note 19, 417 U.S. at 280-281 n.5, 92 S.Ct. at 1578-1579 n.5, 32 L.Ed.2d at 69 n.5; *Tri State Maintenance Corp. v. NLRB*, 132 U.S.App.D.C. 368, 408 F.2d 171 (1968); *K. B. & J. Young's Super Mkts. v. NLRB*, 377 F.2d 463 (9th Cir.), cert. denied, 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967) (mass discharge of unit personnel to evade bargaining obligations with incumbent union held to violate § 8(a)(3), and refusal to bargain with union held to violate § 8(a)(5); *Barrington Plaza & Tragniew, Inc.*, 185 N.L.R.B. 962 (1970) (discriminatory refusal to hire incumbent employees held to violate §§ 8(a)(1) and (3); because purpose underlying refusal to hire was to evade a bargaining relationship and old employees would have constituted a majority of new work force, refusal also held to violate § 8(a)(5) and bargaining obligation imposed).

tions of employment when the union requested it to do so, this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.³²

But, to the general rule that a successor employer may specify initial employment terms without first conferring with the union, the Court articulated an exception—on the applicability of which the present litigation turns—for circumstances in which a duty to bargain will arise early enough in the predecessor-successor transition to necessitate union involvement in designation of those terms:

³² *Id.* at 294, 92 S.Ct. at 1585, 32 L.Ed.2d at 76-77. The Court thus overturned a line of Board decisions requiring a successor employer always to bargain with the incumbent union before instituting employment terms different from those prevailing under the predecessor's contract, whether or not the successor was bound by that contract. See, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. 876 (1971); *Valleydale Packers, Inc.*, 162 N.L.R.B. 1486 (1967), *enforced*, 402 F.2d 768 (5th Cir. 1968), *cert. denied*, 396 U.S. 825, 90 S.Ct. 66, 24 L.Ed.2d 75 (1969); *Overnite Transp. Co.*, 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 383, 88 S.Ct. 59, 19 L.Ed.2d 101 (1967).

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, *there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.* In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June.³³

III

In the case at bar, the Board dealt with the *Burns* exception by referring to the principles established in its *Spruce Up* decision.³⁴ The Board observed that even if

³³ 406 U.S. at 294-295, 92 S.Ct. at 1585-1586, 32 L.Ed.2d at 77 (emphasis supplied).

³⁴ *Spruce Up Corp.*, *supra* note 21. In an earlier decision in *Spruce Up Corp.*, 194 N.L.R.B. 841 (1972), the Board had held:

[W]here, as here, an employer who is about to acquire a going business manifests an intent to retain his predecessor's employees they become at that point his employees for the purpose of the application of Section 8(a)(5), and he is obligated to bargain with a union which is the statutory representative of such employees.

Id. at 846. While the Board's original order was pending before the Fourth Circuit for enforcement, the Supreme Court decided *Burns*, and at the Board's request the case was remanded to the Board for reconsideration in light of *Burns*. See *Spruce Up Corp.*, *supra* note 21, 209 N.L.R.B. at 194. On remand the Board modified its earlier decision and enunciated the principles at issue in the present case.

Boeing "intended" to hire all or substantially all³⁵ of TWA's employees, those "intentions" were from the outset tied to the terms and conditions specified in the Boeing-IAM nationwide agreement.³⁶ Quoting from its opinion in *Spruce Up*, the Board reasoned:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.³⁷ The possibility that the old employees may not enter into an agreement relationship with the new employer is a real one³⁸

Thus the Board theorized that a successor employer's intention to retain large numbers of his predecessor's employees is not likely enough to come to fruition when his offer of employment is coupled with an announcement of reduced wages and benefits, and in such instances no duty to bargain over initial terms and conditions of employment would arise.

In its *Spruce Up* opinion, the Board maintained that a construction of the *Burns* caveat emphasizing simply the

³⁵ The Board has construed the Court's term "all," see text *supra* at note 33, to mean "all or substantially all" of the incumbents. *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 541. Of course, when the successor plans to expand the total work complement such that even if all incumbents were employed they would constitute only a minority, a presumption that the extant union will represent most of the new employees cannot follow from the successor's intention to retain incumbents.

³⁶ *Id.*

³⁷ See text *supra* at note 33.

³⁸ *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 541, quoting *Spruce Up Corp.*, note 21, 209 N.L.R.B. at 195.

employer's manifested intentions, rather than the probability of employee acceptance of jobs with the successor, would discourage employers from commenting favorably on the employment prospects of old employees.³⁹ Sensitive to that concern, the Board interpreted the *Burns* exception to apply only to situations in which a successor employer has misled employees into believing that all would be retained on the basis of existing wages, hours and conditions of employment, or at least to instances in which a successor employer has failed to make plain an intention to alter terms and conditions prior to offering employment to incumbent employees.⁴⁰

³⁹ *Spruce Up Corp.*, *supra* note 21, 209 N.L.R.B. at 195.

⁴⁰ *Id.* The Board has consistently adhered to this interpretation. See, e.g., *Virginia Sportswear, Inc.*, 226 N.L.R.B. 1296 (1976); *C.M.E., Inc.*, 225 N.L.R.B. 514 (1976); *Nazareth Regional High School*, 222 N.L.R.B. 1052 (1976), *enforcement granted in part and denied in part*, 549 F.2d 873 (2d Cir. 1977); *United Maintenance & Mfg. Co.*, 214 N.L.R.B. 529 (1974); *Henry M. Hald High School Ass'n*, 213 N.L.R.B. 415 (1974); *Anita Shops*, 211 N.L.R.B. 501 (1974); *Ranch-Way, Inc.*, 203 N.L.R.B. 911 (1973).

The Sixth and Seventh Circuits have each imposed a requirement of preliminary bargaining consistent with the *Spruce Up* rule. In *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977), a successor employer expressed his intention to retain the old employees and indicated to them that the operation "would carry on as usual." The court voiced its view that "the facts in the instant case are sufficient . . . to establish that the employees were misled by 'tacit inference' into believing they would be retained without change from the condition of employment." *Id.* at 846, quoting *Brotherhood of Ry. Clerks v. REA Express, Inc.*, 523 F.2d 164, 171 (2d Cir.), *cert. denied*, 423 U.S. 1017, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975). In *NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963 (7th Cir. 1972), *vacated and remanded*, 411 U.S. 912, 93 S.Ct. 1547, 36 L.Ed.2d 304, *on remand*, 205 N.L.R.B. 784 (1973), *enforced*, 515 F.2d 512 (7th Cir.), *cert. denied*, 423 U.S. 927, 96 S.Ct. 274, 46 L.Ed.2d 255 (1975), the court approved the Board's determination of unlawful unilateral action when an employer manifested a purpose to hire his predecessor's employees without contemporaneously advising them of plans to change working conditions and thereafter fixed working conditions different from those of the predecessor. See also,

IV

We think the Board's construction of the *Burns* exception reasonably implements the considerations reflected in *Burns* as a whole.⁴¹ The *Burns* Court accorded much importance to a successor employer's freedom to alter—even

Zimm's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1142-1144 (9th Cir.), cert. denied, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 65 (1974).

In *Nazareth Regional High School v. NLRB*, *supra*, the Second Circuit invoked *Spruce Up* to deny a bargaining obligation where a successor employer proposed new employment terms after earlier communicating to the incumbent employees its intention to hire the entire incumbent staff without committing itself to adoption of the old terms. The Board had contended that because Nazareth failed to indicate in an initial announcement of intent to rehire all of the employees that new terms would be imposed, *Spruce Up* was distinguishable, and that a finding of a duty to bargain at that point was justified. 549 F.2d at 881. Rejecting that thesis, the court proclaimed that "[t]he important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have been *promised* reemployment on the existing terms." *Id.* (emphasis supplied). We have no occasion to consider the restriction thus imposed.

⁴¹ When the case summons an interpretation, not of statutory language itself, but of Supreme Court pronouncements of controlling statutory principles, deference to the Board may ordinarily be less appropriate. The *Burns* exception, however, provides minimal guidance, which is supplemented only generally by the policy considerations manifested in the decision. That the proviso can and should be construed with sensitivity to conflicting policies is evident from its terms; the exception envisions preliminary bargaining in "instances in which . . . it [is] *appropriate* to have [the successor] initially consult with the employees' bargaining representative." See text *supra* at note 33. *NLRB v. Bachrodt Chevrolet, Inc.*, *supra* note 40, 468 F.2d at 972 (dissenting opinion). Balancing competing interests to effectuate national labor policy, particularly in the successorship context, is a delicate responsibility committed primarily to the Board. See *IAM v. NLRB*, *supra*, note 26, 134 U.S.App.D.C. at 245, 414 F.2d at 1141 (concurring opinion). Compare *NLRB v. Local 103, Ironworkers Int'l*, 46 U.S.L.W. 4081, 4085 (U.S. Jan. 17, 1978). We are inclined, then, to yield deference to the Board's construction once assured of its compatibility with the spirit as well as the language of the *Burns* opinion.

remake—the acquired enterprise.⁴² Certainly that includes the ability ordinarily to set initial employment terms and conditions without preliminary bargaining with an incumbent union.⁴³ The exception to the successor's normal prerogative is narrow: initial-terms bargaining, in the Supreme Court's words, need occur only in "instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it [is] appropriate to have him initially consult with the employees' bargaining representative."⁴⁴

IAM insists that the *Burns* "plans to retain all" exception unambiguously mandates initial-terms negotiations whenever a successor employer manifests an intention to hire substantially all of the incumbent workforce, whether or not that objective is conditioned on acceptance of substantially reduced benefits. From the Board's viewpoint, however, the difficulty in that position is that an employer's readiness to hire only those incumbents who agree to less favorable terms may fall far short of a "perfectly clear" plan to perpetuate the old workforce as the majority in the new.⁴⁵ Recruitment objectives thus conditioned,

⁴² 406 U.S. at 287-289, 92 S.Ct. at 1582-1583, 32 L.Ed.2d at 72-74.

⁴³ The *Burns* decision restricted prevailing Board doctrine under which initial-terms bargaining was the rule rather than the exception. See note 32 *supra*. *Burns* made the bargaining obligation ordinarily conditional on actual hiring of the predecessor's employees, thus leaving the successor usually free to fix unilaterally the terms of the hiring. Of course, once recruitment has been completed, the chosen representative of a majority of the new employees may insist that the successor negotiate with respect to terms and conditions of employment. See note 52 *infra*.

⁴⁴ See text *supra* at note 33.

⁴⁵ See *Spruce Up Corp.*, *supra* note 21, 209 N.L.R.B. at 195:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as

says the Board, negate an inference of probable continuity of employment⁴⁶ and, we might add, without more the incumbent union cannot fairly claim to represent the larger number of the successor's prospective employees. In such circumstances, as the Court observed in *Burns*, "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with the union, since it will not be evident until then that the bargaining representative represents the majority of the employees in the unit as required by Section 9(a) of the Act. . . ." ⁴⁷

that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

Since the relevant factor is the degree of likelihood that incumbents will work for the successor, in some circumstances a specification of terms might refute the clarity of retention plans even though the offered terms are comparable to those afforded by the predecessor employer. Thus, in *United Maintenance & Mfg. Co.*, *supra* note 40, the Board declined to hold unlawful a refusal to bargain over initial terms when the employer proposed to continue existing terms but the circumstances made it plain that those terms were unacceptable to incumbent employees. On the other hand, a worsening of terms conceivably may not, in some contexts, foredoom substantial retention.

⁴⁶ See note 45 *supra*.

⁴⁷ *NLRB v. Burns Int'l Security Servs., Inc.*, *supra* note 19, 406 U.S. at 295, 92 S.Ct. at 1586, 32 L.Ed.2d at 77; see *Pacific Hide & Fur Depot, Inc. v. NLRB*, *supra* note 29, 553 F.2d at 612:

The *Burns* sentence implies that when a new employer hires only part of the old unit, together with others who were never part of the unit, any decision regarding the employer's duty to bargain with the union affects the new employer, the old employees whom he has hired, and the new employees who were not previously represented by the union. The rights of all three

We think, then, that the Board may with ample reason conclude that only when an employer has indicated a purpose to retain incumbents, but has not concomitantly proposed substantial reductions in benefits, can it "be evident" that the incumbent union "represents a majority of the employees in the [successor] unit" prior to actual induction of the predecessor employees, and that only then may the union demand a say about initial terms of successor employment. To be sure, in view of the substantial harmony existent in the parties' positions, only minor adjustments in initial terms may then remain to be negotiated, and it must be acknowledged that compulsory bargaining usually yields greater returns when labor-management differences are of more appreciable magnitude. It cannot be gainsaid, however, that some affiliation between employer and employee must be at least presumable as a threshold matter before an obligation to bargain arises. So long as perpetuation of the incumbent workforce remains highly speculative, that precondition is not met.

Even when *Burns* is read, as the Board does, to limit compulsory initial-terms bargaining to situations wherein the successor has indicated that incumbents will be retained and has not concurrently announced downward changes in employment terms, predecessor-employees are afforded an important measure of protection. Once the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expecta-

must be considered. Basic to this consideration is § 9(a) of the Act, . . . which places in the hands of the majority of the employees in the unit the decision whether to be represented or not by the union. That majority's right is paramount. The "full complement" standard of *Burns* attempts to define when the makeup of the controlling majority is to be determined.

Compare note 29 *supra* and accompanying text.

tions, oftentimes critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued,⁴⁸ unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.

The Board was hardly at liberty to ignore these concerns, and its construction of *Burns* is responsive to them. On the one hand, incumbents informed of the availability of employment with the successor entity but contemporaneously notified of substantial changes in the conditions thereof are not lulled into a false sense of security. When, on the other hand, the announcement of job-availability is unaccompanied by any such warning, incumbents may resolve to cast their lot with the successor, secure in the knowledge that they can invoke the aegis of collective bargaining should alterations in the terms of the employment be proposed.⁴⁹

⁴⁸ In *Spruce Up*, the Board did not read *Burns* as restricting bargaining to only those situations in which employees are affirmatively led to expect continuation of existing employment terms. Rather, by the Board's interpretation, initial-terms bargaining is mandatory in "circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, [citing *Howard Johnson Co.*, 198 N.L.R.B. 763 (1972); *Good Foods Mfg. & Processing Corp.*, 200 N.L.R.B. 623 (1972)] or [in] circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, *supra* note 21, 209 N.L.R.B. at 195 (emphasis supplied). See also *Nazareth Regional High School*, *supra* note 40; *C.M.E., Inc.*, *supra* note 40.

⁴⁹ When the employment offer and a subsequent announcement of changed terms both occur prior to actual hiring, the announcement could deter some employees from accepting, notwithstanding that it is made some time after the successor first makes known his plan to

Moreover, the Board has observed, a contrary construction of the *Burns* proviso could dissuade successor employers from favorable forecasts on the employment outlook for incumbent employees.⁵⁰ It seems rather evident that in some instances a new employer desirous of changing prevailing employment terms may feel compelled to reveal his retention plans, notwithstanding a resultant obligation to bargain. But, in the Board's view, as we understand it, the successor more commonly may endeavor to conceal, or to at least postpone publicity on, re-employment objectives in order to avoid the onus of bargaining during the usually difficult period of takeover, and incumbent employees may thereby be deprived of early appraisal of their retention prospects.⁵¹ Given that, we cannot say that the Board was unreasonable in its stand that reading *Burns* expansively with the object of

retain incumbents. If, for example, the successor indicates that he intends to reemploy his predecessor's workforce a month hence, and when employees arrive to submit applications two weeks later he informs them that substantially different terms will be instituted, some incumbents may decide to look for work elsewhere. Nevertheless, a duty to bargain with respect to the proposed changes could possibly be properly imposed on either of two grounds. For lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and perpetuation of the workforce—and as well the representational status of the incumbent union—may be assured. Even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice. Thus a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits. And such an inference may be left undisturbed by revelation of employment terms after the employer's initial announcement but before actual hiring commences. The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own misleading conduct.

⁵⁰ *Spruce Up Corp.*, *supra* note 21, 209 N.L.R.B. at 195.

⁵¹ See *id.*

assuring greater stability for employees might well produce the inverse result.⁵²

⁵² Significantly, nonapplicability of the *Burns* exception does not substantially impair the ability of incumbent employees to ensure suitable terms for the successor employment. Once incumbents are actually *rehired* in sufficient number to constitute a majority of the successor's employees, their organizational representative is then in position to insist that the employer bargain with respect to the conditions of the new employment; as in *Burns* the Court observed, "Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so." See text *supra* at note 27. And that obligation would arise immediately upon completion of hiring, notwithstanding that operations have not yet commenced. The employer would be free, however, to impose the terms he originally envisioned after consulting in good faith with the union. Thus the *Burns* Court remarked:

If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 [the first day of operations] without committing an unfair labor practice. Cf. *NLRB v. Katz*, 369 U.S. 736 n.12 (1962); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 272-273 (CA2) cert. denied, 375 U.S. 834 (1963); *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214, 217 (CA5 1964).

406 U.S. at 295, 92 S.Ct. at 1586, 32 L.Ed.2d at 77. But absent a bargaining demand by the union, the successor can simply institute the terms on which the employees were hired as the beginning terms of employment, as was the situation in *Burns*.

The *Burns* exception concerns only the period prior to actual hiring. The thrust of the exception, as construed by the Board, is to forestall unilateral designation of initial terms only when it seems clear that the predecessor's employees will be retained or when necessary to safeguard employer-generated expectations that incumbents will be rehired on terms comparable to those already in vogue. See text *supra* at notes 41-43. It should be evident that a bypass of initial-terms bargaining consistent with the Board's reading of *Burns* does not lock indefinitely the carried-over workers into conditions not to their liking. Though *Burns* affords successor employers appreciable freedom in effectuating the successorship transition, the initial adjustment of rights between the employer and incumbents is largely temporal, and if incumbents are retained they can at that point endeavor collectively to improve their lot.

V

We are constrained, then, to sustain the Board in its conclusion that a successor employer need consult with an incumbent union with respect to initial employment terms prior to fixing them only when he has not evinced any intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents. We are persuaded, too, that the Board's construction of *Burns* was applied properly to the situation at bar. From the outset, Boeing's decision to retain TWA employees was inseparable from its decision to cling to a scale of diminished wages and benefits. Indeed, Boeing's contract bid to NASA was premised importantly on labor costs reflecting a reduction in the rate of remuneration earned under its predecessor's regime, and all concur that the terms Boeing stipulated fell appreciably short of those prevailing under TWA's auspices. Moreover, Boeing's inability to attract enough incumbents to compromise a majority of the new workforce tellingly evidences the inhibitive effect of the reemployment terms.⁵³

On these facts, the Board could reasonably determine that Boeing lacked a sufficiently clear retention plan to activate the *Burns* exception. It follows that Boeing's failure to negotiate with IAM over initial employment terms did not trespass upon the statutory obligation "to bargain collectively with the representatives of [Boeing's] employees."⁵⁴ The order of the Board dismissing the General Counsel's complaint must accordingly be

Affirmed.

⁵³ The administrative record discloses that incumbents declined employment with Boeing because of the proposed reduction in wages. *Boeing Co.*, *supra* note 2, 214 N.L.R.B. at 561 n.62 (decision of administrative law judge).

⁵⁴ § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

214 NLRB 541 (1974)

MFJKP

D—8957

Kennedy Space Center, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 12—CA—5141

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

DECISION AND ORDER

On January 21, 1974, Administrative Law Judge Benjamin B. Lipton issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, the Respondent filed an answering brief, and the National Aeronautics and Space Administration filed an *amicus curiae* brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of

¹ We hereby correct the following inadvertent errors in the Decision of the Administrative Law Judge which in no way affect his Decision or our adoption thereof: In the first sentence of the first paragraph of sec. III, E, November 13 should be changed to November 23; in the third sentence of the same paragraph, February 26 should be changed to March 1; in the first sentence of the second paragraph of sec. III, E, "31" should be deleted; in the first chart in the fourth paragraph of sec. III, F, the number of Boeing "Accepts" should be 25 rather than 26; in the second chart in the same paragraph the number of "Other" "Applications Received" should be 2,279 rather than 279, and the number of "Other" "Extended"

the Administrative Law Judge, as modified herein, and to adopt his recommended Order.²

The Administrative Law Judge rejected the contention of the General Counsel and the Charging Party that Respondent had a "perfectly clear" plan to retain a substantial majority of the TWA incumbents so as to create an obligation on the part of Respondent, as set forth by the Supreme Court in *Burns*,³ to consult with the Union before it set its initial terms and conditions of employment. In so concluding, the Administrative Law Judge relied on a number of factors.

Although we agree with his conclusion, we rely solely on the reasons set forth in the majority opinion in *Spruce Up Corporation*, 209 NLRB No. 19 (1974), as applied hereafter to the facts of this case. Thus it is undisputed, and our dissenting colleagues do not deny, that even if it

should be 586 rather than 580; in the first sentence of the fourth paragraph in sec. III, J, "immediately" should be deleted and "On March 1, 1971" should be added after "furnished"; the sentence in the last paragraph of sec. III, J, should read: "The ultimate fact established is that on April 1, Boeing had 970 employees on its installation support services payroll, divided among 380 TWA incumbents, 138 Boeing employees (transferred, recalled from lay-off, former), 450 outsiders and 2 employees unidentified as to source"; in the first sentence of the quoted contract in the first paragraph of sec. III, M, "its" should be "this."

The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

² The Charging Party's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the positions and arguments of the parties.

³ *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

can be said that Respondent "intended" to hire all or substantially all of the incumbents, Respondent's "intentions" were from the outset tied to the lower rates and benefits of the Boeing-IAM contract. In these circumstances, as we said in *Spruce Up*:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one. . . .⁴

⁴ *Spruce Up Corporation, supra*, 11th par. of Board opinion.

Member Kennedy concurred in this finding of the majority in *Spruce Up Corporation*. He notes that the dissenters in this case have misinterpreted the recent holding of the Supreme Court in *Howard Johnson Company v. Detroit Local Joint Executive Board Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO*, 94 S.Ct. 2236, 2244 (1974). The Court there stated:

This continuity of identity in the business enterprise necessarily includes, *we think, a substantial continuity in the identity of the work force across the change in ownership*. The *Wiley* Court seemingly recognized this, as it found the requisite continuity present there in reliance on the "wholesale transfer" of Interscience employees to Wiley. *Ibid.* This view is reflected in the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the successor in § 301 suits under Wiley. [Footnote omitted.] This interpretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact retained in "the transition from one corporate organization to another" from sudden changes in the terms and conditions of their employment, and with its belief that industrial strife would be avoided if these employees' claims were resolved by arbitration

Accordingly, for these reasons we shall order that the complaint be dismissed in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended order of the Administrative Law Judge and orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., Nov. 1, 1974.

EDWARD B. MILLER, Chairman

HOWARD JENKINS, JR., Member

RALPH E. KENNEDY, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

rather than by "the relative strength . . . of the contending forces." [Emphasis supplied.]

Thus Member Kennedy believes that the dissenters misread the Supreme Court's decision in *Howard Johnson* when they suggest that successorship does not turn on whether the successor's employees constitute more than half or less than half of the predecessor's employees. In his view there can be no substantial continuity in the identity of the work force when fewer than 50 percent of the predecessor's employees are hired by the new employer.

Th dissenters' concern that an incoming employer can control his status under the Act ignores the holding of the Supreme Court in both *Burns* and *Howard Johnson* that the former employees have no legal right to continued employment with the new employer who has the right not to hire any of the former employees, if it so desires.

MEMBERS FANNING AND PENELLO, dissenting:

Contrary to our colleagues, for the reasons set forth in our separate dissents in *Spruce Up Corporation, supra*, and herein, we find that Boeing is a successor employer to Trans World Airlines (TWA) concerning the employment of the Installation Support Services (ISS) employees at Kennedy Space Center (KSC) and was therefore obligated to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO (IAMAW), as the representative of said employees on that basis from the time of its takeover on April 1, 1971. We further find that Boeing had a clear plan to hire all or substantially all of its required work force from ISS incumbent employees, publicly announced same, and implemented that plan to the extent possible. Therefore, under the *Burns* decision, *supra*, we conclude that Boeing had an immediate bargaining obligation to recognize IAMAW and to consult and negotiate with IAMAW upon sole selection of Boeing on November 23, 1970, to negotiate with the National Aeronautics and Space Agency (NASA) for a contract award before setting wages and conditions of the involved employees.

Concerning whether Boeing succeeded to TWA's bargaining obligation, the Administrative Law Judge properly concluded that NASA awarded Boeing the same ISS operation as administered by the predecessor contractor, TWA, with only minor variations in terms of bargaining unit employees. Thus, he found that there was a continuation of the same relations with NASA, the customer, and of essentially the same services, plant machinery, equipment, and job functions. In addition, he found that there were no material differences between Boeing's method of performing the ISS contract and TWA's method and that there is no evidence that the duties of Boeing's supervisors are different from those who worked for TWA. However, despite all the foregoing

positive factors pointing to the "substantial continuity of identity in the business operation before and after a change" in employer,⁵ the Administrative Law Judge failed to find that Boeing was a successor to TWA because a majority of its ISS unit employees at the takeover on April 1, 1971, did not consist of TWA incumbents, and he found this failure of a majority could not be attributed to unlawful unilateral reduction of wages by Boeing. While, as set forth hereafter, we disagree with the latter finding, without regard to how one determines the pretakeover bargaining issue, we do not for the reasons articulated in the separate dissents in *Spruce Up, supra*, find the lack of majority to be fatally deficient in establishing the successorship of Boeing.

In *Spruce Up* we agreed:

Successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit. In making that determination, the question of whether employees of the predecessor actually predominate over other employees can hardly be the acid test of successorship, although it may be an important factor in determining whether the successor employer has a basis for doubting the Union's majority status.⁶

The fallacy of insistence upon majority population is fundamental. Whether or not an employer has the status of a successor cannot turn in any part on its own decision to populate its work force with more than half or less

⁵ *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551 (1964).

⁶ *Spruce Up Corporation, supra* p. 34 at par. 10 of Member Fanning's separate opinion subscribed to by Member Penello at fn. 48; *Polytech, Incorporated*, 186 NLRB 984 (1970), *enfd.* 469 F.2d 1226 (C.A. 8, 1972).

than half of the predecessor's employees. Otherwise an incoming employer can control too readily its own status under our Act. It can so severely undertake the existing employment terms that, should one less than a majority of the predecessor's employees wish employment with it, by that act alone the employer can guarantee denial of the protection which it is the objective of the successorship doctrine to confer.⁷

Applying these principles to the facts herein, it is clear that as of April 1, 1971, when Boeing took over the performance of the ISS work, it had 970 employees on its payroll within this class, divided among 380 TWA incumbents, 138 Boeing employees (transferred, recalled from layoff, and former), 450 outside employees, and 2 employees unidentified as to source. In this breakdown, the TWA incumbents comprised more than 39 percent of Boeing's employees. In our view these figures amply support a finding that the TWA employees constituted a "legally significant portion of the successor's employment force" and a "stable nucleus" of Boeing's work force. Accordingly, we conclude, given all of the other aforementioned positive factors, that Boeing is a successor to TWA, Boeing succeeded to TWA's bargaining obligation on and after April 1, 1971, and Boeing violated Section 8(a) (5) by failing and refusing to recognize and bargain with the Union pursuant to its demand of March 12, 1974.

In *Burns, supra*, the Court held that in general a successor is free to set the initial conditions of employment

⁷ *Howard Johnson Company, supra*, wherein the Court referred to "a substantial continuity in the identity of the work force." (Emphasis supplied.) Members Fanning and Penello disagree with Member Kennedy that successor status depends on whether a majority of the predecessor's employees are retained by the successor. See their separate dissents in *Spruce Up Corporation, supra*; fn. 21 in *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB No. 31; *Polytech, Incorporated, supra*.

upon which rehiring is conditioned without bargaining with the union, since prior to hiring a substantial proportion of his predecessor's employees it will not be clear that he has a duty to bargain with the union. However, the Court also said that the duty to bargain may precede the formal rehiring of employees where "it is perfectly clear that the new employer plans to retain all of the employees in the unit" ⁸ The Court then went on to say:

In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit⁹

Concerning the question of whether Boeing was obligated to bargain with the Union over the fixing of its initial terms and conditions of employment, it seems to us entirely clear that Boeing did plan to retain all or substantially all of the former TWA employees. Thus, the request for proposal issued by NASA required offerors to submit a basic staffing proposal, explaining in depth how the offeror would obtain competent personnel, including a statement of its plans regarding the employment of incumbent workers. In response, Boeing stated that "In order to maintain continuity of support approximately 86 percent of the proposed organization will be staffed by qualified incumbents." This representation that it would retain about 86 percent of the incumbent work force was repeated throughout its response. Boeing explained that its staffing proposal "recognizes the desirability of retaining incumbent contractor personnel to provide continuity of functional support." It further

⁸ *Burns, supra* at 294-295.

⁹ *Ibid.*

stated that its "analysis indicates that effectiveness and economy can be achieved by retaining experienced and qualified incumbent personnel."

Boeing's constant theme in its written proposal was the acknowledgement of need for continuity and Boeing's intended use of incumbent contractor personnel. Thus, Boeing proposed a detailed 62-page baseline phase-in plan. One of the criteria established in writing the plan was "Boeing can and will staff the majority of the total work force from the incumbent contractor." Boeing also averred that, "After incumbent employees have been reviewed and those selected given an opportunity for employment with Boeing, qualified local hires will be hired to fill the remaining vacancies." (Emphasis supplied.) In addition, Boeing's industrial relations chief at the KSC, John A. Sutherland, admitted that with respect to the ISS work performed by the TWA incumbent employees represented by IAMAW, Boeing expected to hire a work force of about 1,000 employees, of whom it proposed to recruit "All we could get" from the TWA incumbents, no less than 86 percent and "closer to 100 percent" Detailed, selective procedures for incumbents were devised and presented which gave prominence to selection of incumbents.

As to existing collective-bargaining agreements, Boeing expressed its disbelief that the IAMAW-TWA agreement "can be legally applied" to Boeing. The IAMAW-Boeing agreement, it stated, "could cover the people performing the work."

Boeing began an immediate implementation of its plan to use all or substantially all incumbents by extensive public announcements. Boeing told the press; and newspapers in circulation in Brevard County, Florida, wherein the KSC is located, reported that Boeing would hire a "majority" or a "large percentage" of TWA incumbents. Boeing was quoted as saying that "we want to upset the

community as little as possible." Indeed, Boeing assured IAMAW, during their first meeting in late November 1970 and then at their second meeting on December 4, 1970, that it would retain most of the TWA incumbents in employment. As admitted by Clifford W. McGee, Jr., Boeing's employment supervisor during the Phase-in of the ISS project, he told IAMAW "that we desired to employ in essence most of our required employees from the ranks of the incumbent contractor." At a meeting on November 30, 1970, Boeing informed TWA that "most of them [TWA employees] would be hired." As TWA Director of Industrial Relations Keil recalled, Boeing stated it "expected to hire between 80 to 90 percent" of the TWA incumbents. Moreover as Harry Orlander, TWA's staff vice president, operations and services, stated, Boeing indicated it "hoped to hire the majority [it] desired to hire as many TWA people as possible." In addition, on December 1, 1970, TWA informed its employees that "Boeing is interested in hiring the majority of TWA/KSC employees."

Boeing further implemented its plan to use the incumbents by putting into effect initial procedures designed to hire the majority of the incumbents. Thus, by December 4, 1970, Boeing and TWA agreed upon a detailed procedure by which TWA incumbents desirous of employment with Boeing would apply for a job. Even when hampered by the effective strike action of Local 773, Boeing did all it could do in seeking to obtain the incumbents. Boeing conducted early interviews of incumbents. Boeing offered jobs early to incumbents. Boeing substituted job offers to incumbents at the last moment in place of offers already made up for "others," at least for required skilled leadmen and journeymen incumbents, who were, of course, essential to run the operation efficiently. Reviewing fully, as we have just done, what Boeing was required to plan for, what Boeing

proposed, what Boeing publicly announced, and what Boeing did, we can only conclude that Boeing planned to retain all or substantially all of the incumbent's work force within the meaning of the aforementioned *Burns* language.

Our colleagues in the majority in effect would transform an incoming employer's "plans to retain" his predecessor's employees, which is the *Burns* test, into "a commitment to hire or an actual advance hiring of such employees," as found by the Administrative Law Judge. The latter meaning is wholly different and is destructive of the "plan to retain" standard. A "commitment to hire or an actual advance hiring" is an overt entry into a contract of employment between the employer and employee with nothing left to consummate the engagement except reporting for work at a future fixed time. It is, albeit informal, an offer and acceptance of employment, and hence a completed contract.

A "plan to retain," on the contrary, necessarily precedes any "commitment to hire or an actual advance hiring" A plan to retain simply signifies that the incoming employer proposes to look to the incumbent employees as the primary source of his work force. That plan is the stage preliminary to the employer's approach to the incumbent. It precedes, and is independent of, any ensuing commitment to hire or actual advance hiring. Once the subsequent commitment or actual advance hiring is made, it is no longer a plan; it is a consummated transaction. It is therefore self-contradictory to equate the plan with the commitment. The former precedes the latter; it is not coterminous with it.

Our colleagues agree with us that *Burns* does not condition the obligation to consult initially with a union before fixing employment terms on a showing of the succeeding employer's intention to retain *all* unit employees. Instead, an employer has a duty of initial consultation

when it becomes evident that he, in fact, will retain a sufficient number of his predecessor's employees so that the incumbent bargaining representative will continue as the 9(a) majority representative of the successor's employees.

Support for this view is found in the Court's quoted *Burns* language. The Court followed its "plans to take all" language in the very next sentence of its opinion by stating that "in other situations, however," it may not be clear whether a succeeding employer must bargain until he has hired his full work complement. When the two sentences are read together, it appears that the Court has compared the situation where the representative status of the union is clear with the situation where the union's representative status and the consequent employer bargaining obligation is not evident until after the full complement is hired. The "plans to retain all" sentence is therefore to be viewed as referring to the obvious, rather than to the sole situation in which the employer's bargaining obligation arises. Equally apparent, from the Court's language, a successor employer's initial bargaining obligation can be said to arise also in a situation where, as here, he plans to retain sufficient unit employees to continue the union's majority status, and that, consequently, a planned "substantial retention" gives rise to the bargaining obligation.

Our separate dissents in *Spruce Up, supra*, dealt with the central fallacy of our colleagues' analysis, i.e., as Boeing's plan to retain the incumbents was "simultaneously and inextricably linked in Boeing's proposals" with the lower terms it proposed to offer them, the existence of the plan did not in the language of *Burns* impose upon Boeing the obligation to "initially consult with the employees' bargaining representative before [the incoming employer] fixes terms." In response, it was said then, and we reiterate now:

The Court [in *Burns*] there said nothing about a conditional intent to hire. The majority are attempting to revise substantially what the Court said, for their view, would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he "plans" to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity.¹⁰

The majority's contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear "the mediatory influence of negotiation" where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end.¹¹

Therefore, we conclude that Boeing's unilateral fixing of ISS wage conditions at a wage rate substantially below those rates which prevailed under TWA was in

¹⁰ *Spruce Up*, *supra* at par. 4 of Member Penello's separate opinion.

¹¹ *Ibid.* at par. 14 of Member Fanning's separate opinion.

violation of its duty to bargain and was unlawful under Section 8(a)(5). We also find for the reasons below that TWA employees acted concertedly and under the guidance of Local 773, starting in December 1970, in refraining from sending employment applications to Boeing because of the unilaterally reduced wage rates. These employees became unfair labor practice strikers of Boeing protesting Boeing's unilateral action.

Thus, TWA employees acted concertedly and under the guidance of Local 773, starting in December 1970, and refrained from sending employment applications to Boeing because of the unilaterally reduced wage rates. Local 773 first determined what TWA proposed to do. It then went to Washington, D.C., to ascertain what was happening; and while there, alerted IAMAW of TWA's ISS employees' basic interest in preserving their wage rates. It visited NASA. It learned that Boeing was proposing not to pick up any part of its contract. It formulated demands which included a position of preserving its rates. These demands became known to Boeing. Local 773 acquiesced initially to a few applications being sent to Boeing through Keil's office with cover letter sufficient to preserve its position on rates; and sufficient to give Boeing the message that Boeing was going to have to consider the position of Local 773 if Boeing wanted cooperation in the orderly transition of incumbents. Thereafter, Local 773 guided employees in withholding applications; brought pressure on Boeing thereby; and consequently restricted interviews. It publicly demonstrated. Local 773 pursued its position until it got a meeting with Boeing and IAMAW on February 19, 1971, at which time the strikers through the IAMAW unconditionally requested reinstatement and offered to begin work for Boeing and to submit whatever forms were required.

The Administrative Law Judge relates there was confusion over a number of items and that it is speculative

as to why incumbent employees reacted and did not submit applications. Such an approach at best mixes varying reasons for support of a local union's position with the fact that a local union action was taken. It makes no difference that the International did not authorize the strike action. The issue is whether Local 773 called for said action and incumbent employees in responding engaged in protected concerted activity. The withholding of applications was the recommended action. The local announced it in meetings. Members were so notified by mail in a letter under signature of the local union president. It is enough if the local union told incumbent employees not to turn in applications; or even as later that the local preferred they not do so. The acts taken were believed by the local at the time as acts taken in the best interest of the membership and the employees by following such directed actions agreed.

Accordingly, Boeing was under an immediate obligation to reinstate the strikers as of the time Boeing began operations on April 1, 1971, replacing, if necessary, employees already hired. Boeing's failure to accept them was itself violative of Section 8(a)(1) and (3) of the Act. Had Boeing not unlawfully refused to reinstate these strikers clearly the majority, if not fully 85.6 percent, of the work force would have been obtained from the eventual 944 who applied. Furthermore, employees who were entitled to reinstatement but not reinstated should be reinstated and made whole for any loss of pay suffered or status lost.

In conclusion, for the reasons stated above, we would find Respondent violated Section 8(a)(5), (3), and (1)

of the Act, and would order Respondent to take appropriate action to remedy these violations.

Dated, Washington, D.C., Nov. 1, 1974.

JOHN H. FANNING, Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

JD-22-74
Kennedy Space
Center, Fla.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 12-CA-5141

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Robert G. Romano, Esq., for the General Counsel.

Alley, Rock and Dinkel, of Miami, Fla., by *James M. Blue, Esq.*, and *Scott Charlton, Esq.*, for the Respondent or Boeing.

Bernard Dunau, Esq., of Washington, D.C., for the Charging Party or the IAM.

DECISION

Statement of the Case

BENJAMIN B. LIPTON, Administrative Law Judge: From July 24 through 27, 1973, this proceeding was heard before me in Tampa, Florida. The charge was filed and served on April 1, 1971, and the complaint thereon was issued by the General Counsel on May 10, 1973. Alleged are certain violations of Section 8(a)(1), (3) and (5) of the Act, more specifically defined below. Comprehensive main and authorized reply briefs¹ were filed

¹ Received October 1, 1973.

by the General Counsel, Respondent and Charging Party; and by special leave, a brief *amicus curiae* was submitted by the National Aeronautics and Space Administration, herein called NASA.

Upon the entire record,² and from my observation of the witnesses who testified before me, I make the following:

Findings of Fact

I. The Business of Respondent; Jurisdiction

The Boeing Company, herein called the Respondent or Boeing, with its principal office and place of business in Seattle, Washington, is generally engaged in the manufacture of aircraft and aerospace equipment. In Brevard County, Florida, at the Kennedy Space Center, herein called KSC, Respondent provides test support management, plant engineering and maintenance, and other services pursuant to a contract with NASA effective from April 1, 1971. The latter operations are particularly involved in this proceeding. During the year preceding issuance of the complaint, Respondent received goods and materials directly in interstate commerce at its KSC facility valued in excess of \$50,000. I find that Respondent is engaged in commerce within the meaning of the Act.³

² At the instant hearing, the parties stipulated the authenticity and admission into evidence of various documents and exhibits, including transcripts of depositions and appended exhibits taken in another proceeding before the U.S. District Court, Orlando (Florida) District. However, each of the parties reserved the right to argue the materiality and relevancy of all these documents. The stipulated material provides the major portion of all the evidence. The complete record thus made comprises the equivalent of some 7,000 transcript size pages and briefs consist of about 400 pages.

³ Certain contentions of Respondent contesting the Board's jurisdiction are considered and rejected *infra*, following a description of the underlying issues.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called the Union or the IAM, is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *The Pleadings; the Issues Broadly Defined*

In essence, the complaint alleges:

Par. 5. All employees at KSC performing installation support services, herein called ISS, constitute an appropriate bargaining unit.

Par. 6. From March 9, 1964, to March 31, 1971, Trans World Airlines, herein called TWA, performed the ISS operation pursuant to contract with NASA.

Par. 7. Since February 1964, and continuing to date, the IAM has been the exclusive bargaining representative of the employees in the appropriate unit, above.

Par. 8(a). Since February 1964, TWA has recognized and had successive contracts with the IAM covering the employees in the above appropriate unit,—the last such contract containing an effective term from January 28, 1970, through December 31, 1971.

Par. 8(b). By letter dated March 19, 1971, Respondent formally recognized the IAM as the exclusive representative of the employees in the appropriate unit, above. (This allegation is more properly to be noted in chronological context, *infra.*)

Par. 9(a). On June 30, 1970, NASA issued a request for proposal (RFP) from contractors to perform the ISS operation at KSC commencing April 1, 1971.

Par. 9(b). On August 19, 1970, Respondent submitted its contract proposal to NASA which stated that 85.6

percent would come from the complement of TWA employees then performing the ISS work at KSC.

Par. 9(c). On November 23, 1970, Respondent was designated as the bidder with whom NASA would negotiate a contract for such services; and on March 11, 1971, such a final contract was negotiated and executed between Respondent and NASA to commence performance on April 1, 1971.

Par. 10(a). In meetings on November 24 and December 4, 1970, Respondent notified the IAM that the employees it would hire to perform the ISS work, including the TWA incumbents, would receive wages and benefits under the terms of Respondent's existing national contract with the IAM, rather than the wages and benefits provided in the current agreement between the IAM and TWA. The IAM requested Respondent to bargain about "this imposed lesser wage scale" (as specified in Respondent's contract proposal to NASA).

Par. 10(b). On December 5, 1970, the IAM notified Respondent that it objected to Respondent's refusal to continue the employment terms set forth in the TWA-IAM agreement.

Par. 11. From December 5, 1970, to February 19, 1971, a majority of the TWA incumbents, in protest of Respondent's "announced intent to institute unilateral changes in wages, hours, and working conditions" beginning April 1, 1973, concertedly withheld submission of their individual applications for employment with Respondent.

Par. 12. Such concerted withholding of applications "constituted a strike" against Respondent which was caused and/or prolonged by the unfair labor practices of Respondent in unlawfully announcing and scheduling unilateral changes in employment conditions affecting the ISS employees.

Par. 13. On January 15, 1971, the IAM again protested to Respondent the unilateral action of establishing different wages and conditions and requested that Respondent "hire all TWA incumbents under the terms" of the TWA-IAM contract.

Par. 14. On February 19, 1971, the IAM notified Respondent that "all" TWA incumbents unconditionally requested continuation of their employment with Respondent beginning April 1, 1971, and would now submit applications for employment to Respondent.

Par. 15. Despite the foregoing "unconditional offer on behalf of all" TWA incumbents, Respondent since February 19, 1971, has failed and refused to offer employment "to a majority of the TWA installation support employees, the exact identity and number of which employees are not now known."

Par. 16. Respondent's unlawful announcement and unilateral establishment of lower wages and different conditions of employment for the employees "it would employ at KSC, caused many TWA installation support employees (the exact identity and number of whom are not now known) to fail to submit a timely application for employment with Respondent, thereby causing less than a majority of the TWA employees to be employed by Respondent and causing the majority to suffer loss of their employment."

Par. 17. Since November 23, 1970, Respondent has been "the designated successor employer to TWA with regard to" the ISS operation at KSC, and since April 1, 1971, has performed the same services for the same customer, NASA, as did the predecessor contractor, TWA.

Par. 18. Consistent with its prior unilateral announcement, since April 1, 1971, Respondent has "unilaterally imposed the terms, wages, hours and working conditions" of its national agreement with the IAM upon the employees in the appropriate unit, "and has thereby caused

employees to forfeit employment and/or to suffer loss of wages" by reason of the lower wage rate schedule of such national agreement.

In his brief, General Counsel requests the remedies that Boeing be ordered (a) to reinstate with backpay the TWA employees it did not hire (about 600), and (b) to recognize the bargain with the IAM "for the employees performing the work."

Respondent denied essentially all the foregoing allegations, except those in Paragraphs 6, 8(a), 9(a), and (c). Respondent's formal answer to the complaint contains 55 separate defenses, including a lengthy statement of facts; and at the hearing it filed 6 additional separate defenses.

As already noted, the evidence taken at the hearing consists mainly of voluminous stipulated material, as supplemented by further testimony and exhibits.⁴ In this context, questions were not raised, nor rulings made, as to the propriety of Respondent's 61 separate defenses. Many of these defenses merely present extended argument and are not truly affirmative defenses properly asserted in a pleading; and many, in my opinion, are frivolous, and unduly burden the record.⁵ Therefore, the general ruling is made that only those separate defenses which were specifically brought out at the hearing or in Respondent's briefs are appropriately presented for consideration.

⁴ Respondent's motions to strike, and various objections to, testimony cited in the briefs of the General Counsel and IAM are denied. Authenticity of the evidence has been stipulated; the materiality of its use, particularly in briefs, involve questions of weight to be assigned. Exh. 14(H) to Jt. Exh. 1 was stipulated subject to the parties' agreement as to its completeness. Jt. Exh. 3 was reserved for such agreement after the hearing. Having been advised post-hearing that agreement was not reached, I have placed Exh. 14(H) with the rejected exhibits.

⁵ Concerning the filing of an answer, see Sec. 102.21 of the Board's Rules and Regulations, and Rules 8(e)(1) and 11 of U.S. District Court Rules of Civil Procedure.

Particularly in view of the manner in which this record was made by the parties and the wide range of arguments and counterarguments in the briefs, it is important to maintain a close focus on the actual issues for decision in this proceeding.

The principal issues presented within the framework of the complaint fall into two broad segments:

(1) Whether Respondent is a successor employer and whether, as such, it breached its obligation to bargain with the IAM by unilaterally changing the terms and conditions of employment which existed under the predecessor employer, TWA. On these issues pertaining to the successorship doctrine under the Act, the more recent opinion of the Supreme Court in the *Burns* case,⁶ and the Board's subsequent applications of this case, are of controlling significance. The complaint does not allege that Respondent generally refused to recognize and bargain with the IAM⁷ or that Respondent violated Section 8(a)(5) in respects other than the alleged unilateral actions. Indeed, Paragraph 8(b) of the complaint specifically asserts that on March 19, 1971, Respondent formally recognized the IAM as the exclusive representative in the contended appropriate unit of the ISS employees, (an allegation validly disputed by Respondent). Respondent advances various arguments that it, Boeing, is not legally a successor to TWA in the performance of the ISS operation at KSC, and that, even assuming such successorship and a duty to bargain, Respondent fulfilled its bargaining obligation under the Act. Further, it should be indicated that Respondent adopted a major position when it submitted its competing bid to NASA to assume the contractorship for the services,—a position

⁶ *N.L.R.B. v. Burns International Security Service, Inc.*, 406 U.S. 272 (May 1972).

⁷ Although such an allegation is expressly set forth in the charge filed by the IAM on April 1, 1971.

to which it has consistently adhered. Thus, Respondent maintains that the incumbent IAM-represented ISS employees properly constituted an accretion to a unit of employees performing other services for Respondent at KSC who were embraced in a preexisting national agreement between Boeing and the IAM.

(2) Whether certain of the TWA incumbents, from about December 5, 1970, through February 19, 1971, engaged in a concerted activity, cognizable and protected under the Act either as unfair labor practice or economic "strikers,"—by withholding their employment applications to Respondent prior to Respondent's takeover of the NASA contract on April 1, 1971. Assuming an affirmative finding to the latter question, a further issue is whether such TWA incumbents abandoned their concerted activity on February 19, 1971, so notifying Respondent, and "unconditionally requested reinstatement"⁸ by Respondent to their status and rights which existed prior to the "strike"; and whether any of such TWA incumbents after February 19, 1971, were deprived by Respondent of employment or other rights because of their protected concerted activity. As reasonably construed, the complaint does not allege violation of Section 8(a)(3) on the basis of deliberate and motivated discrimination by Respondent in failing to employ any of the TWA incumbents. Nor, apart from the formalized complaint, has such a contention been clearly advanced to my notice and properly attempted to be substantiated in the litigation. The complaint itself, which is not further clarified in the arguments, describes the alleged violations of Section 8(a)(1) and (3) as stemming directly from the alleged denial of protected rights re-

⁸ The theory presented is that these TWA incumbents occupied the same legal status under the Act as unfair labor practice or economic strikers who submit unconditional applications to the employer for reinstatement to their jobs.

lated to the withholding of employment applications, and as a consequence of the alleged unilateral actions.⁹

Despite the voluminous evidence introduced and argued on all sides at great length, the facts immediately essential to this decision are virtually undisputed. However, the narrative which follows is not intended as findings that all such facts are considered to be material but to provide a sufficiently rounded context within which the issues and arguments of the parties may be comprehended and evaluated.

B. *The IAM and Its Subordinate Units*

(1) The IAM, as an International, was the recognized and contracting party in the two collective bargaining agreements, with TWA and with Respondent Boeing, which existed during the material time of the bidding and award of the ISS contract at KSC.

(2) District Lodge 142 confines its membership to employees of TWA and Ozark Airlines at KSC and other locations.

(3) Local Lodge 773, with membership consisting of TWA employees at KSC, was a subordinate unit of District Lodge 142 until April 1, 1971, (the takeover

⁹ Respondent's motion to dismiss the complaint on the basis of Section 10(b) is denied. Those violations alleged which preceded the limitation period, beginning October 1, 1970, were continuing in nature. The contention that prosecution is barred by laches is rejected. *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 is applicable. The jurisdictional defense that Boeing is exempt from the Act as a joint employer with NASA has no merit. It is clear that Boeing exercises effective control over the employment conditions of its employees at KSC and is competent to bargain collectively within the requirements of the Act. See, e.g., *Atlantic Technical Services Corp.*, 202 NLRB No. 13; *Herbert Harvey, Inc.*, 171 NLRB 238, 239, enfd. 42 F.2d 770, 778 (C.A.D.C.). Indeed, Boeing has been subject to the Board's jurisdiction in an election proceeding in 1955 (*infra*) involving its employees working on the Bomarc project at KSC.

date by Boeing) and assisted in administering the IAM contract with TWA. In April 1971, Local Lodge 773 also became affiliated with District Lodge 166, and has since assisted in dealing with Boeing with respect to the ISS employees.

(4) District Lodge 166 assists in the negotiation and administration of contracts with employers operating at KSC and elsewhere.

(5) Local Lodge 2061 is a subordinate unit of District Lodge 166 and assists in the negotiation and administration of the contract with Respondent as it applies to KSC.

C. *History of TWA and Boeing at KSC; Contracts with the IAM*

From March 9, 1964, through March 31, 1971, TWA operated the ISS project for NASA pursuant to a cost-plus-award-fee contract and successive extensions thereof. This operation, sometimes referred to as "house-keeping" services, included test support management, plant engineering and maintenance, and logistical functions relating to NASA's utilization of KSC as a principal launch site for space vehicles. Under subcontracts from TWA, certain other firms performed guard, fire, janitorial, training and documentation services. As of March 7, 1971, there were 1054 ISS employees embraced under contract between the IAM and TWA, for an effective term from January 28, 1970, through December 31, 1971. For the most part, these covered employees performed various mechanical and craft functions. The agreement described a single unit encompassing all airline and other operations of TWA in the nation, and was expressly to be governed by the Railway Labor Act. The parties had successive contracts of similar content dating from February 17, 1964. On such date, the ISS employees were brought within the coverage of the

company-wide contract between TWA and IAM, which specifically identified the "KSC Operation" at Merritt Island, Florida.

Since 1952, Respondent Boeing has had various "hardware" contracts with NASA at KSC involving particular missile projects, e.g., Bomarc, Minuteman and Saturn-Apollo 5. In these contracts Boeing was responsible for "launch support services," generally in the areas of research and testing, including structural work.¹⁰ There were periods of overlap in each missile program, while earlier projects were reduced or phased out, and employees were transferred between different projects. Boeing's total payroll at KSC peaked at 809 employees in 1968, and sharply declined thereafter.

In November 1955, following a consent election,¹¹ the IAM was certified for an appropriate unit (as described in the stipulation) of "all maintenance and production employees in Brevard County, in the State of Florida, employed by the employer. . . ." About 280 employees were affected by the certification who were then engaged under the Bomarc contract with NASA. Thereafter, the IAM and Boeing consummated successive bargaining contracts which specify, as part of their national agreement, a separate unit in the language of the Board certification, above. As of the RFP and ISS award by NASA, the existing Boeing-IAM contract had a term from October 2, 1968, through October 1, 1971. On April 1, 1971, when it took over the ISS operation, Boeing had 287 IAM-represented employees working on its pending missile or hardware projects at KSC.

¹⁰ On certain of the missiles, Boeing performed production, maintenance, testing and research development at many locations other than KSC.

¹¹ Pursuant to a Stipulation for Certification upon Consent Election.

D. NASA's RFP and Boeing's Proposal on the ISS Contract

On June 30, 1970,¹² NASA issued Request for Proposal (RFP) for the ISS operation at KSC under a cost-plus-award-bid contract for 1 year commencing April 1, 1971, with options by NASA to extend the contract for successive 1 year terms. An overlapping period, from February 1 through March 31, was specifically contemplated to phase out the incumbent and phase in the new contractor. In extensive detail, the RFP described the services to be performed, as well as types and qualifications of personnel. The ISS work involved was essentially the same as that performed by the incumbent, TWA, with relatively minor differences.¹³ The prospective offerors were required to explain their recruiting plans, including the "type and estimate" of local and nonlocal personnel; the "approximate number" by type of incumbent employees to be hired; their understanding of existing union agreements; and which employees were to be represented by "bargaining labor." In addition, NASA stated:

1. The NLRB has held that when an employer assumes the operations of another employer without change in employees, jobs or methods, the successor-employer is obligated to bargain with the Union before changing wages and other condi-

¹² Hereinafter, all dates are sequentially in 1970 and 1971 unless otherwise specified.

¹³ Mail and distribution services affecting 51 unit employees were deleted. Other miscellaneous functions involving 70 unit employees were added, e.g., a staffing increase in "Logistics"; elevator maintenance, pad lighting and some heavy equipment operations previously performed by Bendix Corporation. Also newly included were "Documentation Support Services and Training" having little effect on the represented employees. That the ISS operations were basically the same for both of these contractors was deplored by officials of TWA, Boeing and NASA.

tions of employment. Under a recent series of cases, the NLRB has held that the successor-employer must assume the predecessor's collective bargaining agreement. It is NASA's position that the offerors make themselves familiar with the NLRB cases covering this issue, namely, *The William J. Burns International Detective Agency, Inc.*, 74 LRRM 1098; *Chemrock Corp.*, 58 LRRM 1582; *John Wiley & Sons v. Livingston*, U.S. Sup. Ct., 66 LRRM 2769.

2. The offeror will have to apply the NLRB's reasoning in the previously mentioned cases to the scope of the RFP in relation to method in which the work has been performed and to its own intended mode of operation.

On August 19, 1970, in response to the RFP, 8 proposals were submitted to NASA by 7 companies, including TWA and Boeing,—the latter having two bids. All the proposals were treated as confidential documents by NASA, not revealed to the competing bidders, the employees, unions, or general public. As to Boeing's principal proposal, it needs emphasis that the labor costs submitted were based specifically upon the wage rates and fringe benefits contained in its existing national agreement with the IAM, applicable to its KSC hardware contracts.¹⁴ In staffing the total contract (including guards, firemen, supervisory, professional and clerical personnel), Boeing proposed:

Boeing Local	67	3.5%
Boeing other locations	5	—
Incumbent contractors	1779	85.6%
Local Hires	227	10.9%
	2078	100 %

¹⁴ These costs were substantially below the labor costs submitted by TWA based on the wage rates and benefits in its existing agreement with the IAM for the ISS unit.

It was deposed by a Boeing official that the 85.6 percent resulted after calculating the number of its present employees that would transfer to the ISS operation, the number that would be recalled from layoff from Boeing employment in the area, and the number of known talents in the area available for employment. In the proposal itself, there is no clear breakdown of the number of IAM-represented TWA incumbents Boeing proposed to hire.¹⁵ Boeing's proposal included an "alternate staffing" plan, in which it was stated: "While the staffing plan is based on retaining approximately 86 percent of the incumbent personnel, FSES data indicated that the local labor market is sufficient in both skills and number to provide the staffing requirements of this contract."¹⁶ Elsewhere in its proposal, the statement was made that—"After incumbent employees have been reviewed and those selected given an opportunity for employment with Boeing, qualified local hires will be hired to fill the remaining vacancies." In response to NASA's queries regarding union contracts, Boeing stated in its bid, as follows:

Boeing does not believe that the collective bargaining agreement between District 142 of the IAM, and TWA, covering the operations and maintenance employees of TWA can be legally applied to The Boeing Company. However, Boeing has in effect a collective

¹⁵ In a deposition taken on November 17, 1971, an industrial relations official of Boeing indicated that the company expected to hire "the majority," meaning "all we could get," of the TWA incumbents to staff a force of about 1,000 production and maintenance employees. The approximate date or time period of such expectation was not shown in the course of the hiring process, *infra*.

¹⁶ In July 1970, Boeing consulted the Florida State Employment Service, and it was advised, in August, that there would be no difficulty in obtaining qualified personnel in the desired classifications from available manpower in the county. On July 26 and August 1, as a means of surveying the local market, Boeing advertised in a newspaper of general circulation seeking applicants for employment on the ISS work and received numerous affirmative responses.

bargaining agreement with Local Lodge 2061 of District Lodge 166 of the IAM&AW which covers our production and maintenance employees in Brevard County, Florida. . . . Since the Local and District lodge lodges involved are all part of the same International Union, Boeing sees no reason for them to generate any labor dispute accruing from these issues.

Boeing's other, alternative, proposal was eliminated early in the bidding procedures. The wage rates or other content of this bid are not revealed. The record and the decision herein are confined to Boeing's main and successful proposal.

On November 23, 1970, NASA announced that it had selected Boeing "for negotiations leading to an award of a contract to provide installation and technical support services" at KSC.¹⁷ The contract, estimated at \$20 million for the first year, would extend from April 1, 1971, through March 31, 1972, with provision for four 1-year extensions. On April 1, 1971, Boeing undertook performance of the ISS contract, without the phase-in period contemplated in NASA's RFP and Boeing's proposal, and proceeded to apply the terms of its "hardware" contract with the IAM, notwithstanding the latter's opposition.

Relating to the prospective and actual award of the NASA contract to Boeing,—the events developed along several concurrent courses: formal and other protests of NASA's action; meetings and communications within the IAM; meetings and communications between Boeing and the IAM apprising each other of their opposing positions; and the recruitment of ISS personnel by Boeing.

¹⁷ On November 25, 1970, the Orlando Sentinel reported that—"Boeing officials said that the firm would hire about ninety percent of the TWA employees and subcontractor employees."

E. The Protests and Challenges

On November 13, formal protests with the U.S. Comptroller General were immediately lodged by TWA¹⁸ and Pan Am (Airlines). The IAM supported this challenge. On February 26, 1971, when TWA's protest was rejected, the IAM itself formally filed with the Comptroller General a challenge to the Boeing award disputing the claimed applicability of the Boeing—IAM agreement to the ISS operation. (This was ultimately denied in June 1971.) TWA sought an injunction against NASA in the Federal District Court (D.C.D.C.), which was denied on March 10. Then, on March 11, NASA announced that Boeing was given the final award of the ISS contract. Various other suits were filed in the Federal courts seeking to set aside Boeing's selection, and for other relief.¹⁹

¹⁸ On the basis, in part, that the purchasing power of the Government was being used as an instrument to deprive employees of the wages and benefits gained through collective bargaining with an incumbent contractor.

¹⁹ E.g.: In April 1971, the IAM filed a grievance with Boeing that, in violation of the IAM-TWA agreement, Boeing failed to retain at least 602 incumbent employees on and after the takeover on April 1, that it treated the incumbents that it retained as new hires, and that it failed to observe the terms of the IAM-TWA agreement. The IAM then requested arbitration. In May 1971, Boeing brought action in a Federal District Court seeking a declaratory judgment that it "is not a successor to [TWA] and is not bound" by the TWA agreement; and the IAM counterclaimed seeking enforcement of its arbitration demand. After April 1, Boeing placed in escrow and refused to remit to the IAM the dues it deducted from the employees' wages pursuant to their individual authorizations. As part of its counterclaim, the IAM requested turnover of the dues. In October 1972, the Court found that "Boeing is not a successor and is not bound by the collective-bargaining agreement between TWA and IAM," and denied enforcement of the arbitration demand,—basing its decision on Boeing's failure to employ a majority of the TWA incumbents. The Court also ordered Boeing to remit the dues to the IAM. *Boeing v. IAM*, 351 F.Supp. 313 (D.C.M.D. Orlando, Fla.). Appeals by the IAM and Boeing are pending before the Fifth Circuit Court of Appeals. In 1971, the IAM filed suit against the Secretary of Labor, NASA,

On January 31, 1971, at roadway entrances to KSC, placards in the name of Local 773 were exhibited stating protests, e.g., "Is NASA Involved in Wage Busting?" Boeing was not named. On February 27, 1971, U.S. Senator Lawton Chiles held a public meeting in a theater at Merritt Island, Florida, attended by officials of IAM, Boeing and NASA, and a large audience at which the controversy was aired concerning the ISS contract at KSC. And generally, following Boeing's selection in November 1970, various forms of protest against NASA's actions were communicated to U.S. Senators, Representatives and Congressional committees.

Directly related to NASA's award of the ISS contract at KSC,²⁰ the Service Contract Act was amended on October 9, 1972, by the addition of a new Section 4(c), in substance providing that a succeeding contractor subject to that statute shall pay its service employees no less than the wages and fringe benefits specified in the collective-bargaining agreement with the predecessor employer.²¹

and Boeing contesting the award to Boeing on the ground that it was made without compliance with the Service Contract Act of 1965; it sought vacation of the award to Boeing, resolicitation of the NASA contract, and indemnification of the employees for the loss they sustained in receiving less than the minimum wages and fringe benefits prevailing in the locality. In November 1973, the suit was dismissed. *IAM v. Hodgson, et al.*, 21 W. H. Cases 344 (D.C.D.C.).

²⁰ Senate Report No. 92, and Hearings before Subcommittee on Labor, Senate Labor Committee, on S. 3827, H.R. 15376, 92d Cong., 2d Sess. (1972); Hearings before Special Subcommittee on Labor, House Labor Committee, on H.R. 6244, 6245, and Report of Special Subcommittee on Labor, House Labor Committee, "The Plight of Service Workers Under Government Contracts," 92d Cong., 1st Sess. (1971).

²¹ "No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits . . .

F. Staffing the ISS

Following its selection by NASA on November 23, 1970, Boeing proceeded with arrangements for staffing the ISS operation on the contingency that it would later be awarded a firm contract. In contemplation of the phase-in provisions of the RFP, Boeing's proposal specified certain recruitment procedures to be implemented in consultation with NASA and with the concurrence of the existing contractor, TWA. These included the establishment of an on-site employment office; review of personnel folders furnished by TWA and preparation of a list of incumbents recommended for hire; and use of selected TWA supervisors reporting to nearby offices in work areas to interview incumbent candidates. An employment schedule, prepared in November 1970, projected that 1,500 offers in all categories would be extended by February 1, and 2,500 offers by March 1. And it was expected that staffing would be completed by March 3, although all employees would not be on Boeing's payroll until March 31. However, the proposed procedures were sharply altered. On November 30, 1970, an initial meeting took place between high officials of TWA and Boeing. TWA objected to on-site recruitment by Boeing because it would interfere with TWA's operations in the remaining period of its contract with NASA. Instead, Boeing accepted TWA's proposal that TWA undertake to dis-

provided for in a collective-bargaining agreement . . . to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That . . . such obligations shall not apply if the Secretary finds after a hearing . . . that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." Pub. L. 92-473. Of course, the Service Contract Act and the National Labor Relations Act are separate statutes with entirely different purposes. The contention of the IAM that, as to the issues herein, the N.L.R.A. "must be interpreted compatibly with the public policy enunciated by Congress" in the foregoing amendment of the Service Contract Act has no validity.

tribute the employment applications, collect the completed forms, and return them to Boeing. TWA refused to make available the incumbent personnel folders. Thereafter discussions continued between officials of TWA and Boeing.

On December 1, in general meetings and by letter, TWA informed its employees of procedures concerning their employment after the Boeing takeover. A "Declaration of Interest" form was distributed which the employees were asked to complete and return to their supervisor. On this form, the employee was requested to indicate certain choices: (1) employment by the successor contractor, (2) consideration for a TWA position at a specific location, (3) consideration for a job at any TWA location, (4) exercising union security rights under the TWA-IAM contract to displace another TWA employee, and (5) seeking employment elsewhere. Only those employees who indicated such an interest received from TWA forms of employment application with Boeing. However, it also appears that some of the incumbents were able to obtain applications from other sources and by direct request from TWA; and some personally made application at Boeing's off-site employment office. TWA also conveyed the information to the employees that Boeing had indicated a desire to employ a large percentage of the incumbents.

As of December 18, TWA advised Boeing that about 500 incumbents had indicated on their Declaration of Interest forms that they desired to work for Boeing. TWA specifically advised the employees of its formal protest with the Comptroller General against NASA's selection of Boeing and that, failing in its protest, it would do everything that it could to assist employees in finding other employment. On January 8, it stated in a bulletin to employees that it was strongly convinced of the validity of its claims, and it intended to pursue the protest to an ultimate conclusion. On January 7, 8, and 9,

newspaper ads were placed by Boeing seeking applicants for the ISS work. Boeing's reason was that, until then, it had received an insufficient number of applications from incumbents to satisfy its schedule for staffing. It also hoped that, when the incumbents saw the ad, they would get their applications in expeditiously. In response to the ads, Boeing received numerous applications from nonincumbent sources in all position categories. As of January 11, Boeing had received applications from 263 TWA hourly employees. These were more than half of the IAM-represented employees who had earlier indicated to TWA an interest in such employment; and they comprised 26 percent of Boeing's ultimate requirement of hourly employees. In other categories,—general office, professional-technical, and management,—most of the TWA incumbents had already applied by this date. On January 11, Boeing's daily status report shows that 59 TWA hourly employees had been interviewed, of whom 20 received offers, and that 112 former Boeing employees had been interviewed for hourly jobs, of whom 11 received offers. In mid-January, NASA requested that Boeing halt further offers of employment until the completion of an Apollo space launch scheduled for January 31. During the interim period, Boeing continued all aspects of its recruitment procedures, except the placing of prepared offers in the mail,—which in fact were mailed after the launch on January 31. In this process, "quite a few" offer letters already prepared for nonincumbents were withdrawn and sent instead to incumbents. As of February 2, a cumulative total of 851 offers had been extended for hourly jobs, of which 227 went to TWA employees, 78 to former Boeing employees, 39 to current Boeing employees, and 507 to "other" applicants.²²

²² The offers were made contingent upon final award by NASA, with the work scheduled to start on April 1. In offers made to laid-off employees elsewhere in the Boeing system, they were advised that failure to accept the offer would result in change from layoff status to terminated.

As of February 19, a critical date in the complaint,²³ Boeing's status report shows the following figures in the recruitment of hourly employees:

	Applications Received	Inter- views	Offers Extended	Accepts	Rejects	Sign- ups
Former						
Boeing	168	171	128	116	12	51
Boeing	0	0	46	26	0	0
TWA	435	354	273	205	4	81
WAC*	359	1	52	0	0	0
Other	1771	614	547	464	67	264

* Wackenhut Corp., apparently reflecting the employment of guards, outside the IAM bargaining unit.

As of March 20, applications had been received from 626 TWA employees, of whom 467 had been interviewed, with 403 offers extended. The earlier targeted dates for completion of the hiring process for hourly employees and the originally planned phase-in period prior to April 1—had been abandoned.²⁴ As of Boeing's takeover on April 1, the final data as to hourly employees indicate:²⁵

	Applications Received	Inter- views	Offers Extended	Accepts	Rejects	Sign- ups
Former						
Boeing	242	175	143	124	19	124
Boeing	0	0	46	41	5	41
TWA	944	472	454	403	48	402
WAC	401	1	318	309	9	309
Other	279	629	580	467	119	467

²³ I.e., the allegation that on February 19 an unconditional request for reinstatement was made upon termination of a "strike" which commenced about December 5.

²⁴ After January 31, Boeing had an "accept target line" of about 12 days, estimated as the average time lag from the offer to an acceptance.

²⁵ Reference has been made to the daily status reports (Comp. Exh. 2-1 to Exh. 14-B of Jt. Exh. 1) which include numbers of applications received. Another exhibit (Exh. 13 to Jt. Exh. 1) reflects comparable but not materially different figures, e.g., that 380 TWA employees were hired as of April 1.

G. The Duncan Question

Respondent contends that it relied on a verbal agreement from the IAM in preparing its bid to NASA predicated upon the Boeing-IAM hardware contract and the lower wage rates and benefits contained therein. In the entire record it is evident that, in seeking to obtain the award from NASA and in its dealings with the IAM thereafter, Boeing maintained a fixed position that its hardware contract with the IAM was applicable to the ISS project. Concededly, it had advice of counsel from the outset. In preparing its bid, it did not attempt to communicate directly with the International, nor seek to obtain from the IAM anything in writing on this subject, because it felt that the Boeing-IAM contract was "very plain" on its face. The verbal assurances which it sought from the IAM was deemed to be "insurance." Thus it appears that, in July 1970, and thereafter, Respondent's industrial relations manager, John Sutherland, had discussions with Robert Duncan, business representative of District Lodge 166.²⁶ Sutherland told Duncan that, in submitting its ISS proposal to NASA, Boeing was planning to use the rates in the existing IAM (hardware) contract. Duncan was asked to get an opinion from IAM Vice President George Watkins and from IAM General Counsel Plato Papps. On several occasions, Duncan communicated with these and other sources in the International. I credit Duncan's firm denial that he advised Sutherland of any agreement to apply the Boeing-IAM contract,—on the part of Duncan personally, or from the offices of Watkins or Papps. Duncan related to Sutherland the substance of his talks with the International sources²⁷—that no decision had been made on how the IAM would

²⁶ Duncan's term of office expired on December 31, 1970, following a union election.

²⁷ In his deposition taken on November 18, 1971, Duncan clearly stated that, among others, he spoke with Watkins.

go, particularly in view of the numerous bidders on the ISS contract, but that the IAM "did feel that whoever got the contract was going to have to pay the wages, at least, that TWA was paying." There was no mention of such purported verbal agreement with the IAM in Boeing's ISS proposal to NASA, or in its later exchanges directly with the IAM top officials on the question of which of the existing contracts, TWA or Boeing, was applicable. In sum, I reject this contention of Respondent as completely specious.²⁸ However, what is significant from all this evidence is the early and clear indication to the IAM that Respondent was proceeding, in its bid for the ISS work and in implementing the NASA award, on the basis of the Boeing hardware contract, with the provisions for substantially lower wages and benefits.²⁹

H. Internal IAM Activity

About December 3,³⁰ and again in January 1971, there were trips to Washington by a delegation of officials from Local 773 (whose membership consisted of TWA incumbents) to discuss with the IAM International, NASA, and various sources in Congress,—NASA's selection of Boeing to negotiate the ISS contract. The delegations

²⁸ In addition, Respondent appears to rely on a December 30, 1970, letter from Duncan, wherein he agreed to apply to ISS employees certain classifications under the Boeing-IAM contract. This letter can scarcely be found to constitute an agreement by the IAM that the Boeing contract would apply if Boeing obtained (as it later did) the final ISS award from NASA.

²⁹ At the instant hearing, Duncan testified there was a continuing desire by Boeing to determine the IAM's position, and that he thinks he talked to Watkins personally. In his deposition on January 21, 1972, Watkins did not recall a discussion on this subject with Duncan ("it could well have been"), but he "could not say" he was aware prior to December 1970, that Boeing was going to bid the wage rates of the Boeing-IAM contract. In any event, I find it inconceivable on this evidence that the IAM leadership was not put on notice as a result of Sutherland's early overtures.

³⁰ Depositions of IAM Vice Presidents Winpisinger (p. 46) and West (p. 38).

were led by the local president, Darryl D'Andrea. He testified that, in the beginning, there was a lack of policy coordination between Local 773 and the International, apprehension of possible collusion between the IAM and Boeing, and general confusion.

IAM Vice President Winpisinger deposed as to the discussions with the D'Andrea delegations. He assured them that the IAM would do everything legally in its power to defend their jobs and the negotiated wages and conditions regardless of who their employer would be. He assigned a coordinator, Frank Waldner, to guide Local 773 in resolving its problems and to see that the policies of the International were carried out. Waldner would have the assistance of James Fowler or William Dinkelmeier from District Lodge 142 present at KSC. Particularly in view of questions raised by Local 773, Winpisinger, with the concurrence of other high officials, had formulated the policy concerning the Boeing employment applications: The members were to be told to fill out the applications and give them to Fowler, who would then transmit them with a cover letter reserving the rights of the applicants under the TWA-IAM contract. Instructions from the International were firmly and repeatedly conveyed to Local 773 officers to carry out this policy.³¹ According to Fowler, there was some resistance, not so much from the membership, but from three men on the grievance committee who did not wish any applications to be turned in. Fowler deposed that at KSC he told the officers of the Local "they were not to stop people from

³¹ John Peterpaul, an International officer, deposed that Waldner kept him informed of the developments at KSC respecting the activities of Local 773, particularly in the matter of filing Boeing applications. He indicated that the Local had six or ten officers with different opinions as to courses of action in protecting the TWA jobs and wages. He stated that the Local officers were given instructions from the International which they were unquestionably obligated to fulfill.

turning in applications." On December 22, Fowler sent John Keil, TWA's manager of industrial relations, the following letter:

Enclosed herewith are printed forms regarding employee data as requested by the Boeing Company. Please be advised this information is being provided under protest and is in no way to be construed as an acceptance of any lesser rate of pay, hours of employment, working conditions, or other employee benefits as are now, or will be in effect under the terms of the present collective bargaining agreement between the International Association of Machinists and Trans World Airlines.

cc: V. P. Winpisinger

Thereafter, from time to time in December and January, completed forms were hand carried by Fowler to TWA for delivery to Boeing. It is noted that, as of January 11, Boeing had received from TWA hourly employees some 263 applications for employment.³² However, also on December 22, D'Andrea of Local 773 mailed a letter to the membership, in part as follows:

Dear sisters and brothers:

I am writing with regard to the applications for employment. It appears that a great deal of confusion has arisen as to what the union wants done. We have been advised by the International Headquarters that we should not turn these applications in. It is their feeling that the Company is attempting to divide the ranks and thereby undermine our position that our wages, hours and working conditions will remain in effect.

³² Undoubtedly, many of these applications were turned in by the employees to TWA or filed directly with Boeing. Fowler indicated the total number he sent over to TWA was less than 50.

For those people who feel they must fill out an application, we have requested that they leave the wages part blank and turn them in to their local union stewards or committeeman. We, in turn, will forward these applications with a cover letter stating that these applications are only for information purposes and the wages and working conditions will be as set forth in the present IAM/TWA Contract.* * *

D'Andrea conceded that he was in error as to the second paragraph, above, and this was made clear to him and other Local officers by the spokesmen for the International.

In evidence are certain documents of various Local 773 union meetings, notices to members, and communications,—which reflect in part the following:

On December 28, minutes of Local 773 executive board meeting:

We discussed what position to take on the Boeing applications at this time. We agreed to stand by Brother D'Andrea's letter. We would prefer the membership not to fill them out but if you do so, we will turn them in to the Company.

On December 30, a letter from Local 773 to Vice President Winpisinger:

This letter will confirm a request made to Asst. Airline Coordinator Frank Walden on December 30, 1970, that a Grand Lodge Representative preferably Brother George Brown, be assigned to the Kennedy Space Center to assist and advise the Local Officers and Grievance Committee in the problems of the TWA contract with NASA, that is presently in dispute.

This request is made in order to protect the interests of our members, by assuring them that the de-

cisions made here by the local officers are consistent with the thinking of our International Headquarters.

* * *

Early in January, a Local 773 notice to members:

BOEING applications are to be returned to the Local Lodge Grievance Committee through your steward or to your officers.

DO NOT, WE PEPEAT, DO NOT fill in the wage—rate. Instead use the words I.A.M. or T.W.A.

ALL APPLICATIONS THAT ARE FILLED OUT *MUST* BE RETURNED TO THE GRIEVANCE COMMITTEE OR TO YOUR OFFICERS. (Emphasis in original.)

In mid-January, a "Special Fact Notice" from Local 773:

FACT #1: As of this date, *no* company has been awarded the contract now held by T.W.A.

FACT #2: We have been advised by NASA that *no award* would be made prior to final decision on protests lodged by T.W.A. and PAN AMERICAN.

FACT #3: Our International President, Floyd E. Smith, has notified the *White House, The Secretary of Labor, NASA, The Comptroller General* and other appropriate Government Agencies that the IAM's position is that the KSC-TWA union members should be afforded continuation of employment with wages, benefits and working conditions as provided under the terms of the present IAM-TWA Agreement.

FACT #7: Some TWA employees have been advised by *letter of ultimatum* from prospective employer that reply on desire for employment must be returned by X date—or else! In response to this latest threat to your job security, and with the as-

sistance of . . . District 142 representatives on Friday, we were in constant contact with top government officials in Washington and we have now been advised that the Boeing Company rescinds the deadline expressed in their letter and will again contact these TWA employees, sometime in the *future*, who may have submitted applications! (Emphasis in original.)

(Attached to this "Special Fact Notice" is a telegram on January 15 sent to Boeing by J. J. Schwind, President-General Chairman of District 142, in part:)

. . . in accordance with applicable law, the entire work force must be offered employment opportunities subsequent to the final awarding of the bid to any successor company. Therefore, the applications for employment that Boeing is soliciting from our union members are unnecessary, and we will take all appropriate steps to support this position for the complete protection of our membership.

On January 26, a "Fact Sheet" from Local 773:

FACT #1. At the time of this writing, the Contract has still not been awarded.

FACT #2. The protest of T.W.A. and PAN AM is still before the Comptroller General's office.

FACT #3. The position in regards to the applications remains the same.

On February 12, a "Fact Sheet" from Local 773:

FACT #1. Until a decision from the Comptroller General's office is made, Boeing does not have a contract.

FACT #2. Status quo on applications.

On February 17, minutes of Local 773 membership meeting at 8 a.m., in the presence of District 142 General Chairman Schwind:

Good and Welfare: President D'Andrea spoke on the contract. A question was asked about the employees who had not turned their applications in to Boeing. President D'Andrea stated that we held out on turning in the applications as we felt this was the best interest of the members. He also stated that there was no guarantee that these employees who held out would be guaranteed a position with Boeing.

On February 17, minutes of Local 773 membership meeting at 5 p.m.:

We have contacted Mr. C. R. McGehee, Division Manager with Boeing, stating wages, hours and working conditions remain the same. It is the District's position that we preserve this, regardless of who the contractor is. Brother Schwind again stated that members should submit an application to Boeing and get your job. On the other hand, it can hurt you and your family.

The foregoing relates particularly to the alleged "strike" from December 5 to February 19. After the Boeing-IAM meeting on February 19, *infra*, there is no contention of concerted withholding of Boeing applications.

I. IAM Meetings and Communications with Boeing and NASA—to April 1

On November 13, 1970, IAM President Floyd E. Smith sent a wire to NASA, stating in substance:

Information reaching my office indicates that NASA now has pending a determination with respect to the continuation of Trans World Airlines Inc., as a sub-

contractor for certain so-called housekeeping functions at the Kennedy Space Center. . . . The employees of TWA in this case are represented by the [IAM]. . . . The employment in question is governed by the provisions of the Railway Labor Act as amended and the [IAM] is the duly authorized and certified employee representative. As such, we have a collective-bargaining agreement . . . which ordains that the work in question will be performed by appropriately classified employees under the coverage of that agreement. The 'scope rule' contained therein effectively and lawfully asserts that the IAM members . . . in effect 'own' the work currently contracted for TWA. That same agreement embodies a 'successor and assigns' clause which preserves all rights accruing thereunder whether or not any change in the employers occurs. . . . We regard the rights enumerated herein as inalienable and this wire may be construed as notice by the IAM that we will do all in our power to preserve them intact including recourse to the appropriate Federal Courts should that become necessary.

* * *

IAM General Vice President William P. Winpisinger deposed on August 23, 1971, that—"Beginning with this telegram and in every subsequent letter or document from our union, we were insisting upon, A, title to the work, and B, wage rates and working conditions commensurate with those enjoyed by the employees manning the jobs, our TWA agreement, in effect."

On December 1, at a NASA-requested meeting with the IAM, NASA indicated that it was going to try to release the ISS contract to Boeing.³³

³³ This was of course already a matter of presumptive knowledge in light of the selection of Boeing on November 23.

On December 4, at Boeing's request, there was a meeting with the IAM of top officials. Principal spokesmen were Vice Presidents Winpisinger and West for the IAM, and Charles R. McGehee, general manager of field operations, for Boeing. Boeing stressed that its tentatively accepted proposal to NASA was based on the current hardware contract at KSC, and that this contract bound the IAM as to wage rates and terms in covering the ISS work. Boeing presented the IAM with a worksheet showing the specific wage rates in various craft and other classifications contained in the TWA and the Boeing contracts, as well as a fringe benefit comparison of these contracts. In 11 of 18 categories, a decrease in excess of 10 percent from the TWA rates is reflected; for example in 5 instances, the decrease is 20 percent. The IAM asked if there was any area in which Boeing could move. Boeing indicated that "there might be if they were allowed by NASA." An internal union meeting was scheduled for the next day, December 5, to consider the position the IAM would take, and Boeing was asked to stand by.

Subsequently, at a luncheon meeting, NASA told the IAM in point blank "that if Boeing even attempted to change wage rates upward that they would reopen the bidding on the contract." NASA emphasized that it had a right to get the lowest possible prices for the contract and effect a cost savings to the Government. Winpisinger and West deposed that, other than the conversation concerning NASA on December 4, they were not aware that the IAM made any subsequent demand for negotiation concerning the wage differential in the contract positions of the parties.

On December 5, the IAM officials met among themselves. Winpisinger gave the version: "After a very careful assessment of Boeing's responses and their flat-footed posture that they had to implement their wage

rates, we then had our own discussion and we had to equally flatfootedly say that there is no way that we as a union can go out and advocate a reduction of wage rates to anybody." Boeing's use of employment applications, of which the IAM was then aware, was not considered, nor the possibility of calling a strike or the use of any other economic pressure against Boeing or TWA. They did "certainly" discuss "how to try and put NASA on the spot for being a wage-cutting agency." Following this meeting, West telephoned McGehee and stated that under no circumstances would the IAM buy the wage scale of the Boeing contract, and that the union position was to pick up under the same conditions provided in the TWA contract.

On December 16, IAM President Smith sent a wire to NASA, with a copy to Boeing, in part as follows: Concerning the negotiations between Boeing and NASA on the ISS contract,—“it is the position of IAM as representative of TWA employees . . . that any successor employer must assume wages, hours, and working conditions as currently embodied in Collective Bargaining Agreement between IAM and TWA. No other labor agreement has applicability . . . Boeing has been advised of this position. . . .”

On December 23, Pete Pitard, an industrial relations employee of Boeing, addressed a memorandum to ISS Project Manager Morehead and Labor Relations Manager Sutherland, stating:

Some more info on Local 773 at TWA:

To date, they have 50 Boeing applications submitted by their membership. They plan to give them to us with a list of demands.

(1) that we accept the group as a unit, without interviews or qualification checks

- (2) that we accept 773 as a bargaining unit
- (3) that we pay 773's scale wages.³⁴

*J. IAM-Boeing Meeting on February 19;
Subsequent Staffing*

On February 19, at the IAM's request, a high level meeting took place with Boeing at Cocoa Beach, Florida. Waldner for the IAM and McGehee for Boeing were the main spokesmen. D'Andrea for Local 773 also attended. IAM's purpose was stated that it was not concerned with who got the ISS contract, but it was prepared to assist in whatever agreement was necessary to effect an orderly transfer of the incumbents. Boeing emphasized that it will hold the IAM to the existing Boeing-IAM contract. At the onset, it made every effort to favor the TWA incumbents, but at this late date it could not extend any preference. Waldner stated generally that the TWA employees he represented did seek employment with Boeing, and offered a membership roster of names. McGehee said this was not good enough; Boeing had to have individual applications. IAM's response was that if it takes some individual piece of paper,—although the matter of the award was “still very much up in the air,”—it will cooperate fully. Waldner deposed that it came as a complete “shock” to the IAM officials when they heard for the first time at this meeting—that the filing of an application would not mean a job for the incumbents, and that they had to pass security, medical clearance and the standard Boeing hiring process. McGehee indicated that “maybe it was too late anyway.” Schwind of the IAM suggested the possibility of a 30-day postponement of the takeover on April 1 to allow for a

³⁴ The source of this information was not shown. Pitard did not testify and no corroboration was offered. Relied on by the General Counsel, this item can only be regarded as pure speculation and hearsay.

smooth transfer of employees. McGehee did not see any benefit to it but said he would “let him know something.” The IAM wanted to send application forms to all TWA incumbents (numbering about 1100), notwithstanding previous distribution of these forms and those already filed with Boeing. Such an understanding was reached at the meeting.

On February 25, Boeing sent a telegram to the IAM concerning Schwind's request for an extension of the April 1 changeover date:

Consistent with your request, we have examined the desirability of requesting an extension of the April 1st take off date for the [ISS] Contract.

We cannot at this time see any benefit to the interested parties. We remain ready to meet with you to discuss the orderly transition of responsibility from TWA to the Boeing Company.

Also on February 25, Schwind sent a letter to McGehee, in pertinent part: Confirming a telephone conversation on February 24, to assure Boeing that “all employees are interested in maintaining employment with Boeing,”—

... we assure you that all IAM-TWA members would be contacted and provided with an individual Boeing employment application form with proper instructions.

The Union, however, advise you that our position remains unchanged regarding lowering the wages, benefits, etc., which the IAM-TWA employees are presently enjoying. (Emphasis added.)

Boeing immediately furnished the IAM with 650-750 application forms, all that it had available at KSC, and arranged to fly in from other locations additional applications; some were also obtained by IAM from TWA. The IAM waited until it had a “sufficient number” to

send to every TWA employee, so that "nobody could claim that they got preferential treatment." In early March, the IAM mailed out the forms to the employees with a covering letter dated February 26. The letter stated in part:

A meeting was conducted with the Boeing Company, a prospective bidder, on February 19. . . . The union very emphatically and clearly informed the Boeing Company that the IAM International President's position remains unchanged with respect to our willingness to pursue into the courts, if necessary, our claim for full and proper application of the existing IAM/TWA Contract. . . .

Accordingly, I have received instructions as follows from District Lodge 142 President . . . Schwind, which are fully endorsed by your Local Lodge Executive Board. You will find enclosed a Boeing application form for employment. You must fill it out completely, except for that portion concerning wages. Please leave that portion blank, and return the form to the local lodge office in the enclosed envelope by return mail, or by other means, promptly. * * *

On March 9, the IAM transmitted 504 completed applications to Boeing with a covering letter, in part as follows:

Enclosed herein please find completed applications of TWA/IAM employees that are interested in maintaining employment in the event that the Boeing Corporation is awarded [the ISS contract], as was discussed at our February 19th conference. . . .

However, be advised that by the Union's supplying the above said applications does not suggest nor imply that our position has changed with regard to the lowering of wages, benefits, etc., which TWA/IAM employees now enjoy.

In letters from March 11 through 16 to Boeing, completed applications from 80 employees were submitted, and from March 18 through 29, 6 additional applications. Thus, from the IAM's testimony, a total of 590 completed applications were sent to Boeing through the IAM after the February 19 meeting. However, Boeing's daily status reports show that, after February 19, it received from TWA hourly employees 778 completed applications, of which 269 were duplicates of previous filings. In these reports it is recorded, for example, that 20 such applications were received on February 23, and that the last group of applications was received on March 22.³⁵ During the same period from February 19 to April 1, there were additional applications filed for hourly jobs by 74 former Boeing employees, to whom 15 were extended offers, and 508 applications from "other" sources, to whom 33 were extended offers. About March 20, Boeing rescinded the acceptances of 17 nonincumbents and 3 incumbents "because of a reduction in requirements." NASA had removed a portion of the ISS contract involving the "Bendix" operation. Boeing explained that it was unable to find other jobs for this group of 20 offerees, among those who were affected by NASA's curtailment. Boeing's stated position was that, apart from this NASA change, it was committed to hire all applicants who had accepted offers and were "signed up." Further, it is noted that the great bulk (507) of the offers to "other" applicants was made about January 31, from 1,522 applications received in this category. By April 1, of 2,279 applications filed in the same category, 586 offers were extended, and 467 were hired.

Two observations should be made: (1) The IAM had 650-750 application forms immediately available on February 19 which it could have, without delay, sent to TWA

³⁵ The variations from the IAM evidence, though not at all significant, is not explained.

hourly employees. Having been apprised and being aware that it might already have been "too late," it assumed a risk of jeopardizing job opportunities for some of the interested employees by waiting until early March in order to send out the forms to all 1,100 employees at once. (2) The IAM and the applicants themselves also took such a risk by delaying submission of the completed forms until March 9 and thereafter, while being aware that the takeover date was definitely set for April 1. Furthermore, the employees and Boeing were specifically told in relation to these later applications that the IAM maintained its strong position in rejection of any lowering of wages and benefits from the TWA/IAM contract. In light of these and other factors, it cannot be accepted on its face that all of these late-filing applicants were seriously interested in taking employment with Boeing, while reserving their legal rights, at the lower rates which they knew Boeing was generally offering.³⁶

The ultimate fact established is that on April 1, of 1034 hourly employees hired by Boeing for the KSC project, 402 were TWA incumbents represented by the IAM, or less than a majority.

K. Maintenance Utility Man

This classification was not specified in Boeing's bid to NASA.³⁷ As of April 1, 202 such employees had been

³⁶ It is noted, for example, that TWA had about 1,100 hourly employees, that about 140 of these were retained or transferred within the TWA system, and that 944 filed applications with Boeing as of April 1. These figures leave no room for employees who chose not to file or who had already made other dispositions, e.g., seeking employment elsewhere than at TWA or Boeing.

³⁷ It is a job description or classification which was included by reference in the Boeing-IAM nationwide contract. In Duncan's letter to Boeing of December 30, *supra*, he concurred that this classification might be installed at KSC, and that the "Helper" classification could be "reactivated" under the Boeing-IAM contract. Since Boeing had unilaterally undertaken to apply this contract on April 1, it may reasonably be inferred that it did not act solely

hired by Boeing, of 281 indicated as "required" by Boeing. Generally they were assigned as assistants or helpers to the journeymen in particular crafts, and designated by Boeing to perform lower skill functions than those of the journeymen; they received substantially less than journeymen pay. TWA, as the ISS predecessor, had only two levels of hourly employees,—leadman and journeyman. It is apparent that Boeing undertook to hire a greater percentage of TWA incumbents in higher skill categories, and to hire a greater percentage of "other" applicants in the maintenance utility man and "Helper Learner" categories.³⁸ It is clear that all labor costs were to be paid by NASA, at least in the first year of the ISS contract, and it must be assumed that NASA was aware and approved the extensive hiring of employees as maintenance utility men. Certain employees hired by Boeing in this classification testified they performed the same journeymen work for Boeing as they previously did for TWA. Mainly as a result of grievances filed by the IAM and U.S. Department of Labor procedures invoked to obtain prevailing wage determinations, 130 such classifications were eventually changed by Boeing principally to reflect journeymen wage rates. As of June 27, 1973, only four maintenance utility men were left on Boeing's ISS payroll. The inference to be drawn from this evidence is that Boeing consciously used this classification to reduce the cost in its contract proposal to NASA. It is not alleged, nor can it be found, that

in reliance on Duncan's letter in utilizing the maintenance utility classification for the ISS project.

³⁸ In the initial phase of recruitment, Boeing made efforts to interview incumbents before other applicants. It offered lead jobs carrying maximum pay to TWA applicants on the basis that those who applied early would get the higher paid positions. By such means, it hoped to accelerate the filing of applications by other TWA employees.

violative discrimination against the TWA incumbents was thereby involved.³⁹

L. Request for Recognition

On March 12, following NASA's award of the ISS contract to Boeing, IAM President Smith wrote to Boeing, requesting (1) that Boeing recognize IAM in a unit of the ISS employees, (2) that Boeing refrain from unilateral changes in wages and conditions of employment in such unit, and (3) that Boeing adopt and observe the terms of the IAM-TWA contract. "If Boeing believes that particular terms of that agreement are inappropriate in their application to [the ISS unit], the IAMAW requests that Boeing identify those particular terms. . . . The IAMAW will negotiate with Boeing concerning those identified terms to the end that mutual agreement upon the deletion, modification, or continuance of those terms shall be sought."

On March 19, Boeing replied in substance that (1) it recognized the IAM as representative of the ISS employees, but as an *accretion* to the unit covered by the Boeing-IAM contract and not as a separate unit, (2) it would apply the Boeing-IAM contract to the ISS work at KSC, and (3) it would make no unilateral changes in the employment terms fixed by the Boeing-IAM contract. In addition, Boeing stated that employment had not been offered TWA employees who "failed to timely complete and file employment applications," that on the basis of its current recruitment, at least 625 of about 1,000 ISS employees will be non-incumbent, i.e., that IAM will lack majority representation of the ISS employees,

³⁹ General Counsel's query whether a greater number of TWA employees would have been hired if initially Boeing had properly classified the work performed by maintenance utility men—is entirely speculative and without sufficient substance to affect the issues.

and that Boeing does not regard itself as a "successor" to the bargaining relationship or to the contract which existed between TWA and the IAM.

M. Post-Takeover Relations

On April 1, Boeing assumed the performance of the ISS operation at KSC, and applied to these employees all the terms of the existing Boeing-IAM (hardware) contract. Each of the ISS hourly employees reporting for work on and after April 1 received from Boeing a copy of the Boeing-IAM contract in the form prescribed by that agreement, *viz.*:

Employees in the bargaining unit to which you have been hired or transferred have chosen [the IAM] to be their bargaining agent in accordance with its law and that union now represents all employees in that group on matters dealing with your wages, hours, and working conditions. [The IAM] is the Union that negotiated with the Company the agreement that states these conditions in detail. You are now being given a copy of that agreement. You are urged to study the agreement carefully and thoroughly as soon as you can do so. If you do not understand any part of it, a union representative or a Company representative will be glad to be of help in this regard.

Thereafter, while the IAM maintained its legal position on the applicability of the TWA-IAM contract and opposed the Boeing-IAM contract,—the union security and checkoff provisions of the latter contract were implemented, dues were deducted from the employee's wages (and held in escrow by Boeing subject to the pending law suit, *supra*), numerous grievances were filed by the IAM and settled pursuant to the Boeing-IAM contract, and all other terms of the contract were applied.⁴⁰

⁴⁰ By letter to Boeing on April 8, the IAM set forth its position "incident to the day to day business of representing" the ISS

The existing Boeing-IAM agreement was due to expire on October 1. Contract negotiations commenced between the IAM and Boeing in Seattle about August 3, 1971. I do not regard these negotiations or the results as controlling in any manner on the issues raised herein with respect to the appropriate unit or the applicability of any union contract during the times material. Nevertheless, the substance of this evidence is described to indicate the prevailing relations between the parties.

During the negotiations, Boeing repeatedly raised the question whether the IAM was bargaining for the ISS employees. In each instance, the IAM's position was stated that the matter was in litigation where it was going to stay until resolved, that it could not be settled at the bargaining table, and that the negotiations should not be brought to an impasse on something they could not handle there. In a letter from Boeing to the IAM on October 22, *inter alia* the statement was made:

We are under the impression that [the ISS employees] are now represented in these negotiations but if it is your position that they are not, we stand ready to negotiate with any expanded union group that you consider necessary to accomplish such representation.

The IAM made no reply to this assertion. On November 12, the parties entered into a nationwide agreement effective from December 13, 1971, through October 1, 1974, with provision for yearly automatic renewal. The

employees affected by the Boeing-IAM contract, including matters relating to dues deductions, stewards zones, and seniority standing and listing of employees. The letter was to officially notify Boeing that the actions are taken "without implying any recognition of the applicability of the Boeing Agreement to employees in the ISS operation, . . . and are without prejudice to any action taken or which may be taken . . . relative to the extent of applicability (if any) of the IAM Boeing Agreement to this unit. . . ."

basic terms of the previous Boeing-IAM contract were continued, including the identical descriptions of the units covered. Certain changes were negotiated in wages and other terms which specifically affected the ISS employees. On a question raised by Boeing, the IAM indicated that the ISS employees would be permitted to vote on ratification of the completed contract, their ballots would be impounded, and if these ballots affected the outcome, the matter would then be taken up with the IAM headquarters for a determination as to disposition. Subsequently, the nationwide contract was ratified without the necessity of counting the impounded ballots of the ISS employees.

N. Conclusions

1. The Successorship Question

The Supreme Court's comprehensive decision on the successor doctrine in *Burns*⁴¹ was handed down on May 15, 1972, long after the material events herein. In a reversal of the Board on one issue,⁴² the Court held that successor employers are "not bound by the substantive provisions of a collective bargaining contract negotiated by their predecessors but not agreed to or assumed by them." Other aspects of the Court's opinion are discussed below.

It is thoroughly evident in the present record that, during the relevant period from the RFP through Boeing's take over on April 1, 1971, the parties, in their meetings and communications with each other, assumed and maintained fixed positions, leaving no area of substance for bargaining. Boeing insisted that the Boeing-IAM (hardware) contract, with the wages and benefits therein,

⁴¹ *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272.

⁴² 182 NLRB 348, enforced in part 441 F.2d 911 (C.A. 2—April 1971).

legally applied to the ISS operation. Indeed, Boeing's proposal to NASA incorporated such a position and committed Boeing to the labor costs predicated on the Boeing-IAM contract. For its part, the IAM was equally insistent upon the applicability of its contract with the incumbent, TWA, and it adamantly rejected consideration of any reduction in the existing wages and benefits therein. To a substantial degree, such a reduction was reflected in the Boeing contract with which the IAM was confronted. Thus, virtually from the outset, Boeing and the IAM were in stalemated contract positions, each depending upon the correctness of its legal judgment at the time. Undoubtedly the IAM then relied upon the successorship doctrine extant in the Board's decision in *Burns*,—since overruled in part. There is no allegation in the complaint (issued in May 1973) and, of course, it cannot now be held in any circumstances, that Boeing was required to adopt the TWA-IAM contract to which it did not agree.

As pertinent here, the Supreme Court in *Burns* also described certain bargaining obligations under the Act where all the elements of successorship are present:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, *there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.* In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as re-

quired by Section 9(a) of the Act. (Emphasis added.)⁴³

In the complaint and the briefs, there are basic issues raised (a) whether all the required elements are present to establish Boeing as a successor employer in an ISS bargaining unit; (b) if so, whether it manifested a "plan to retain" within the meaning of the *Burns* case, by including in its contract proposal to NASA a plan to hire 85.6 percent of the incumbent ISS employees, or by other revelations of intent; and (c) whether it violated the Act by failing initially to consult or bargain with the IAM before fixing the employment terms for the ISS employees.

Upon careful consideration of the evidence and the case precedents, my conclusions are negative as to each of these questions.

Accretion contention; appropriate unit

If Respondent was legally justified in its overall position based upon the theory of accretion, the appropriate unit would consist of all hourly employees employed by Boeing at KSC, combining the new ISS employees with those already employed pursuant to Boeing's hardware contracts with NASA. The wage rates and employment conditions for the ISS employees would be fixed by the existing Boeing-IAM agreement, thereby negating the allegations herein of unilateral action by Boeing. For several reasons, I find the accretion principle does not apply in the circumstances of this case. Respondent places heavy reliance on the literal description of the stipulated unit for which the IAM was certified in 1955 to represent the hardware (Bomarc) employees then employed at KSC, i.e., "all maintenance and production employees in Brevard County." This is an insufficient

⁴³ 406 U.S. at 294-295.

basis to warrant an unlimited expansion of such a unit within the geographical area. It cannot be construed that the parties had any intention to cover such a group as the ISS employees in the existing Boeing-IAM contract; and it can scarcely be found here that the ISS employees desired their interests to be merged with those of the "hardware" employees. Nor is it material that each of the groups sought to be combined was historically represented (albeit with the different employers) by the same international union, the IAM,—more especially in face of the IAM's opposition to such accretion. However, the fact that employment conditions of each group was governed by different collective-bargaining agreements militates against the accretion. The evidence indicates that the work of the hardware group in missile launch support services is separate and substantially different from the work of the ISS group engaged essentially in housekeeping functions; and there is no showing of product or employee interchange. Further, it should be realistically contemplated that, as in the past, NASA may issue RFP's and subsequently award the ISS as well as the hardware or missile projects separately to employers other than Boeing;—thus maintaining a consistency in the distinctive identity of the two groups in question at KSC. Finally, it is a recognized consideration in Board and court cases that, absent compelling counterbalancing factors in the entire picture, "the accreted unit should not numerically overshadow the pre-existing unit,"⁴⁴ and thereby deprive the larger group of employees of their free choice in selecting a bargaining representative. Here, Respondent had, at its risk, unilaterally proceeded on an erroneous

⁴⁴ *N.L.R.B. v. Spartans Industries, Inc.*, 406 F.2d 1002, 1005, enfg. 169 NLRB 309. See also, e.g., *N.L.R.B. v. The Horn & Hardart Company*, 439 F.2d 674, 682 (C.A. 5); *N.L.R.B. v. Food Employers Council*, 399 F.2d 501 (C.A. 9); *International Paper Company*, 171 NLRB 526, 527; *Pullman Industries, Inc.*, 159 NLRB 580, 582; *Worcester Stamped Metal Company*, 146 NLRB 1683, 1686.

assumption that, as of takeover on April 1, some 1,034 ISS employees could legally be accreted to the hardware unit of 287 employees. As it developed, of the 1,034 employees hired, 632 were nonincumbents, as to whom there is no showing or basis for presumption in the evidence that they desired to be represented by the IAM or by any union.⁴⁵

*Continuity of the employing industry*⁴⁶

Primarily it is plain that NASA awarded Boeing the same ISS operation as administered by the predecessor contractor, TWA, with only minor variations in terms of bargaining unit employees.⁴⁷ *Inter alia*, there was a continuation of the same relations with NASA, the customer, and of essentially the same services, plant, machinery, equipment and job functions. No material difference exists in Boeing's method of performing the ISS contract. An indeterminate number of supervisory incumbents was hired by Boeing; there is no evidence that the duties of Boeing's supervisors are different from those who worked for TWA. Further arguments of Respondent are unsupported—that guards and nonguards were included in the TWA-IAM unit, and that the unit contained supervisors, essentially in the ISS "lead" categories. The guard functions at KSC were performed

⁴⁵ Unquestionably, the Boeing-IAM contract was imposed upon the IAM against its will. Any implications in Respondent's arguments that the Boeing contract unit is appropriate by virtue of a tacit or de facto acceptance by the IAM of such contract on and after April 1, for the purposes herein, are rejected. Relating to the period subsequent to April 1, there are no complaint allegations stemming from the application of the Boeing contract to the ISS employees, and nothing herein is intended to pass upon any such questions.

⁴⁶ A fundamental test to invoke the successor doctrine for purposes of the Act. E.g., *N.L.R.B. v. Zayre Corp.*, 424 F.2d 1159 (C.A. 5); *Hecker Machine, Inc.*, 198 NLRB No. 161.

⁴⁷ *Supra*, fn. 13.

by Wackenhut Corporation, as a subcontractor for TWA; and the guards were represented by a union other than the IAM. The evidence, as litigated, does not establish that there were supervisors in the TWA unit. Indeed, Boeing itself employed many of the same individuals, having the same functions and title, within the putative Boeing-IAM contract unit. The TWA-IAM contract embraces a nationwide unit of all transportation and other operations of TWA, apparently as required under the Railway Labor Act. After TWA received the award from NASA in 1964, the ISS project at KSC was brought within the coverage of the TWA-IAM contract. Significantly, the ISS project has been separately recognized and identified in the successive agreements,⁴⁸ and the ISS employees thereunder have had local union representation. I find it is no barrier to an appropriate unit of the ISS employees that it would constitute a diminution of the contract unit in effect under TWA.⁴⁹ That the systemwide TWA-IAM contract was governed by the Railway Labor Act would not vitally impede the holding of Boeing's successorship—in view of the factors already noted, and since the Board's jurisdiction and application of the Act's provisions are clear. Respondent's attempted attack upon the legality of TWA's initial recognition of the IAM, in 1964, is not properly litigable herein, particularly by reason of Section 10(b).⁵⁰ That the IAM had no Board certification for the ISS unit at TWA does

⁴⁸ E.g., *Solomon Johnsky d/b/a Avenue Meat Center*, 184 NLRB No. 94; *Ranch-Way, Inc.*, 183 NLRB No. 116; 203 NLRB No. 118 (on remand).

⁴⁹ E.g., *Solomon Johnsky*, *supra*; *Howard Johnson Company*, 198 NLRB No. 98; *Bachrodt Chevrolet Co.*, 186 NLRB 1035 and 205 NLRB No. 122 (on remand); *Dorance J. Benzschawel and Terrence D. Swingen, Copartners d/b/a Parkwood IGA*, 201 NLRB No. 141; *Eklund's Sweden House Inn, Inc.*, 203 NLRB No. 56.

⁵⁰ *Howard Johnson Company*, 198 NLRB No. 98, at fn. 3; *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 132.

not preclude the existence of a bona fide collective-bargaining relationship.⁵¹

As alleged in the complaint, I find that the ISS hourly employees at KSC constitute an appropriate unit for the purposes of collective bargaining under the Act.

Notwithstanding the foregoing positive factors,—on the essential question of Boeing's successor status, it is a most important consideration whether or not a majority of its ISS unit employees at the takeover consisted of TWA incumbents represented by the IAM.⁵² Conceding that such a majority was not employed, the complaint attributes the failure of a majority to unlawful unilateral reduction of wages by Boeing. These allegations are considered *infra*.

The "plan to retain" test of the Supreme Court

A new employer is not obligated by the Act to hire any of the predecessor's employees unless it effectively assumes such an obligation or is discriminatorily motivated in its refusal to employ such employees.⁵³ And a successor employer is ordinarily free to set initial terms under which it will hire the predecessor's employees. How-

⁵¹ E.g., *Howard Johnson Company*, *id.* at p. 8 in TXD slip op.; *Eklund's Sweden House Inn, Inc.*, 203 NLRB No. 56, slip op., at pp. 9-10 of JD.

⁵² *Burns*, *supra*, 406 U.S. at fn. 4; *N.L.R.B. v. Interstate 65, d/b/a Continental Inn*, 453 F.2d 269, 273 (C.A. 6); *Spruce Up Corporation*, 194 NLRB 841, 847; *Dorance J. Benzschawel and Terrence D. Swingen, Copartners d/b/a Parkwood IGA*, 201 NLRB No. 141, slip op., at p. 14 of TXD; *Bachrodt Chevrolet Co.*, 205 NLRB No. 122. Where successorship was denied in the absence of such a majority, see, e.g., *Tallakson Ford, Inc.*, 171 NLRB 503; *Thomas Cadillac, Inc.*, 170 NLRB 884, 885, *affd.* 414 F.2d 1135 (C.A.D.C.), cert. denied, 396 U.S. 889. But cf., *Lincoln Private Police, Inc., etc.*, 189 NLRB 717, 720.

⁵³ *Golden State Bottling Co. v. N.L.R.B.*, — U.S. —, 84 L.R.R.M. 2839, 2845, at fn. 6, citing *Burns*, 406 U.S. at 280, fn. 5.

ever, the General Counsel particularly relies upon the caveat in *Burns* that—

... there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

...

Although the derivation of this statement in *Burns* is not clear, such a dictum of the Supreme Court, in the context, must be accorded full respect. Nevertheless, it cannot be understood that the Supreme Court in this manner is departing from the central collective bargaining concept in the Act based upon the majority principle.⁵⁴ The "plan to retain" language in *Burns* must contemplate that the union involved represents a majority of the unit employees of the successor employer before a refusal to bargain violation may be found on this ground. Thus, to be "perfectly clear," a successor employer's "plan to retain" all or a substantial majority⁵⁵ of the employees of the predecessor must reasonably mean a commitment to hire or an actual advance hiring of such employees to be effective at the takeover of operations.⁵⁶ For purposes of the Act, such a majority is thereby shown at the time of the com-

⁵⁴ See *International Ladies' Garment Workers' Union, AFL-CIO, v. N.L.R.B. and Bernhard-Altman Texas Corp.*, 366 U.S. 731, 737.

⁵⁵ E.g., *Alliance Industries*, 198 NLRB No. 97; *S-H Food Service Inc.*, 199 NLRB No. 4, i.e., less than literally all.

⁵⁶ E.g., *Howard Johnson Company*, 198 NLRB No. 98; *Bachrodt Chevrolet Co.*, 205 NLRB No. 122; *Ivo H. Denham and Geraldine A. Denham d/b/a The Denham Company*, 206 NLRB No. 75. And cf. *Ranch-Way, Inc.*, 203 NLRB No. 118, in which, during a hiatus before takeover, the new employer interviewed incumbent employees, and others, for the jobs to be filled before it decided whom it would hire; only those who accepted the offered wage rates were hired. In the latter case, the alleged violation based on the contention of a "plan to retain" before fixing terms—was rejected; in the former cases, the violation was found.

mitment. However, as the Court further stated—in other situations it may not be clear whether the bargaining representative represents a majority of the employees until the successor employer has actually hired its complement of employees, and only at such time does the bargaining obligation mature if a majority is established.⁵⁷ Where the predecessor's employees constitute a majority of the unit "both before and after the transfer of ownership,"⁵⁸ the earlier revealed "plan to retain" is reinforced and made manifestly clear. In my opinion, it is some indication of the lack of perfect clarity in the initial "plan to retain" where, absent discriminatory cause, there is in fact no majority after the takeover or when hiring is effectively completed.

Various other considerations operate to defeat the General Counsel's major contention that Boeing invoked such a "perfectly clear" plan to retain a substantial majority of the TWA incumbents, and that it violated the Act by fixing the wages and terms of employment in the ISS unit without initially consulting with the IAM. In its competitive proposal to NASA on August 19, 1970, Boeing incorporated a primary staffing plan to hire 85.6 percent of the ISS incumbents at specified wage rates and labor costs substantially lower than the existing

⁵⁷ The Supreme Court distinguished the facts in the *Burns* case from application of the "plan to retain" standard. After *Burns*, as a successor, took over operations on July 1, the unit employees received a lower rate than was paid by the predecessor. During June, it had completed its hiring in the unit with a majority of the predecessor's employees. The Court held there was no "evidence that *Burns* ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent." 406 U.S. at 295.

⁵⁸ E.g., *Good Foods Manufacturing & Processing Corporation, etc.*, 200 NLRB No. 86; *Bachrodt Chevrolet Co.*, 205 NLRB No. 122. And see *Ranch-Way, Inc.*, *supra*, fn. 56, where the obligation to bargain attached only after the successor began operations.

terms for the employees under TWA.⁵⁹ It is a realistic fact that the plan to hire and the lower terms were simultaneously and inextricably linked in Boeing's proposal. Boeing was free to hire or not hire the incumbents and to require applications.⁶⁰ Even assuming a basis for accurate projection in Boeing's staffing plan,—it could not be regarded that the mere submission of its proposal to NASA constituted proscribed conduct of unilaterally changing terms of employment. Despite Boeing's detailed reasons in the proposal to support this staffing plan, such an attempted prediction of ability to hire union-represented skilled employees at sharply reduced earnings was inherently dubious. An alternative plan relying upon researched nonincumbent sources was included in the proposal as an assurance that full staffing could be accomplished within the scheduled time. In the awareness of the IAM and the employees, Boeing's intentions to hire the incumbents were tied to the lower rates and benefits of the Boeing-IAM contract. And they knew that employment applications were required. I do not find that, in the proposal to NASA or in any other form, was an employment commitment made by Boeing to the incumbent employees. While there is an indicated disposition of Boeing to have initially preferred TWA incumbents on a selective basis in the light of available classification vacancies, applications from others, and time targets,—it cannot be held that Boeing was thereby obligated to hire any incumbent individually or as a class. And there was certainly not, in my view, a "perfectly clear" plan to retain a majority of the incumbents within the intendment of *Burns*. Accordingly, General Counsel has not sustained the allegation that Boeing had

⁵⁹ As earlier noted, the 85.6 figure pertained to all categories in the ISS project, and was not related specifically to the unit employees.

⁶⁰ E.g., *Tri State Maintenance Corp. v. N.L.R.B.*, 408 F.2d 171, 173 (C.A.D.C.).

unilaterally changed employment terms in violation of Section 8(a)(5).⁶¹

2. The Alleged "Strike"

The complaint alleges that, from December 5, 1970, to February 19, 1971, a "majority" of the TWA employees engaged in a "strike" against Boeing by concertedly withholding their employment applications. On the theory that they were unfair labor practices strikers or, alternatively, economic strikers,—the General Counsel seeks reinstatement and backpay for all incumbents who were not hired by Boeing,—presumably omitting only those who were retained by TWA. As found, the alleged prior unfair labor practice by Boeing of engaging in unilateral action has not been sustained.

There is no testimony from employees themselves that any of them withheld their applications, concertedly or otherwise, as a means of putting economic pressure on Boeing. During or following the supposed period of the strike, there was no express or implied communication to Boeing of the existence of such a strike from any employee group acting in concert, or from Local 773, or the International IAM. There is no identification of any individual employees, or recognizable group, to constitute the alleged "majority" of incumbents who were purportedly on strike. And there is no evidence to sup-

⁶¹ Respondent argues the "impracticality" of requiring bidders on competitively bid contracts to bargain concerning unilateral changes submitted in the bid. As to Federal Government contracts, perhaps the problem has been largely alleviated in the 1972 amendment to the Service Contract Act, *supra*, so far as wage reductions are concerned. Assuming the Board's power to do so, there appears no valid reason to exempt such employers from the full bargaining requirements of the Act. The facts in each case would be determinative as to when the bargaining obligation matures. See *Emerald Maintenance, Inc.*, 188 NLRB 876, cited and quoted in *Burns*, 406 U.S. at fn. 13. And cf., *Atlantic Technical Services Corporation*, 202 NLRB No. 13.

port the General Counsel's allegation that an unconditional request was made to Boeing on February 19 for reinstatement of TWA employees who had not theretofore filed applications.

The basis of General Counsel's position is far from clear. It is apparently rested on the letters, communications, and notices from Local 773 to its membership and from the evidence that a large number of applications were submitted later in March. The detailed facts need not be reiterated. From the outset, it was the mandatory policy of the International, with its agents on the scene at KSC, to have the applications filed; and it cannot be inferred that the officers of Local 773 deliberately sought to flout this policy. One item largely relied upon by the General Counsel is the letter of December 22 to employees from D'Andrea, Local 773's president. The statement therein that the International had "advised" Local 773 that applications should not be turned in was an admitted error,—which the International quickly undertook to rectify. It is noted that, in the same letter, instructions are given to "those people who feel they must fill out an application." This, in my opinion, is hardly a call for concerted action against Boeing. There was no opposition from Local 773 to the "Declaration of Interest" questionnaire distributed to all TWA hourly employees on December 1. Only about 500 of the responders indicated by December 18 that they desired employment with Boeing. Notwithstanding the alleged call for "strike" action by Local 773, it appears that 435 incumbents filed applications by February 19, the date of the asserted "request for reinstatement." The IAM itself forwarded applications of incumbents on December 22 and thereafter, with a reservation based on claimed rights under the TWA-IAM contract. Some references are made in minutes of meetings and notices to members of only a "preference" by Local 773 that applications not be filled out. Indeed, in early January,

the members were advised in a positive vein to turn in their applications to officers of the Local. Repeated emphasis was placed in communications to the members in January that "no company" had been awarded the ISS contract "now held by TWA," and that no award could be made before final decision on the protests before the Comptroller General. Additionally, during the same period of the alleged "strike," the TWA employees were often reminded by TWA, engaged in the recruitment for Boeing, that its protests were being pursued and that it strongly believed its claims to be valid. The employees were also aware of the lawsuits pending and the efforts to seek Congressional assistance. In this whole context of evidence, the particular reasons of any employees for not filing applications for employment with Boeing can only be speculated. The outstanding circumstances were that Boeing was offering substantially lower wage rates and benefits,⁶² and that the TWA employees were aware of the IAM's vigorous stand in support of the binding effect of TWA-IAM contract on Boeing—an erroneous assumption as it later turned out in *Burns*. It is difficult to conceive in terms of the law the attainment of superior rights by potential applicants for concertedly refusing to seek employment with an employer who is offering unacceptable wages and conditions.

In certain limited circumstances, applicants for employment are deemed employees under the Act,—for example as protection against discrimination in hiring by the employer.⁶³ In the present context, such a concept would be exceedingly strained. Even if it be assumed that certain of the incumbents engaged in an economically motivated concerted activity by withholding their appli-

⁶² In his deposition, D'Andrea indicated that, by withholding their applications, the "people" were showing "that they didn't want to work for the wages Boeing was offering," and felt that the TWA-IAM "contract that they had should be upheld."

⁶³ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177.

cations,—upon the cessation of such action, they would not be entitled to displace employees hired during the period of the concerted activity. Nor, in my opinion, would they be entitled to preference in hiring as against other existing applicants. It is not alleged or found that Boeing deliberately refrained from hiring a majority of the ISS incumbents to avoid successorship or for discriminatory reasons.

In sum, I conclude there is no merit to the allegations that TWA employees engaged in a strike or protected concerted activity against Boeing, or that they were unlawfully refused "reinstatement" on or after February 19. While, as already shown, there is no complaint allegation of a general refusal to bargain, it may finally be noted that the IAM was not properly the majority representative in the ISS unit on, before or after March 12, when it presented Boeing with a formal request for recognition in such unit. I perceive nothing else under the complaint to warrant remedial action.

Accordingly, it is hereby recommended that the complaint be dismissed in its entirety.

Dated at Washington, D.C.
JAN 21, 1974

/s/ Benjamin B. Lipton
BENJAMIN B. LIPTON
Administrative Law Judge

**SUPPLEMENTAL
APPENDIX**

Antecedents of the *Burns* "plans to retain" exception

151 NLRB 1074 (1965)

CHEMROCK CORPORATION AND TEAMSTERS, CHAUFFEURS, HELPERS & TAXICAB DRIVERS LOCAL 327, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA.
Case No. 26-CA-1590. March 24, 1965

DECISION AND ORDER

On December 20, 1963, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief. The Respondent filed a reply brief.

The National Labor Relations Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and finds merit in the General Counsel's exceptions. Accordingly, the Board adopts the Trial Examiner's findings and conclusions only to the extent that they are consistent with the Decision herein.

The facts may be briefly summarized. Tennessee Products and Chemical Corporation, herein Tennessee Products, a large, diversified company, was engaged in the manufacture of insulation products at a plant in Nashville, Tennessee. It had a collective-bargaining agreement with the International Association of Machinists covering the production and maintenance employees and another agreement with the Charging Party, Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local 327, herein called the Union, covering the five truck-drivers at the Nashville plant. The latter contract, which ran from Septem-

ber 12, 1961, through September 11, 1963, also covered the five drivers who operated trucks for Tennessee Products from Chattanooga, Tennessee.

On July 29, 1963, Tennessee Products sold the Nashville plant to a newly formed company, the Respondent, Chemrock Corporation, with Chemrock to take over the plant on August 1, 1963. After that date, the Respondent continued to produce the same products, on the same machine and with the same employees as had Tennessee Products. The plant superintendent continued in that capacity. Tennessee Products' general superintendent became president of the Respondent. The vice president of the Respondent had formerly been in charge of sales for Tennessee Products. Respondent purchased Tennessee Products' trucks and took over its sales, credit, and purchasing files. The Respondent did not, however, assume Tennessee Products' contract obligations.

With respect to its production and maintenance employees, the Respondent continued the employment of the former employees of Tennessee Products at the same wages as before and a few weeks after beginning operations negotiated a new contract with the Machinists. With respect to its drivers, however, the Respondent pursued a different course.

On July 10, 1963, Tennessee Products notified the Union of the contemplated sale of the plant in Nashville and on the same date notified the Respondent of the existence of the collective-bargaining agreement between Tennessee Products and the Union and enclosed a copy thereof. On July 17, 1963, Sloan, the Union's business agent, wrote a letter to Respondent's attorney, Taylor, reminding him of the existence of the agreement and notifying him that the Union wished to reopen the agreement and bargain with the Respondent regarding changes. Taylor acknowledged receipt of the letter on July 24.

On July 29, 1963, the Respondent called a meeting of the truckdrivers then working for Tennessee Products. Sloan, who had been notified of the meeting by the drivers, appeared at the appointed time. The Respondent's president, Duvier, excluded Sloan from the meeting, however, and Sloan returned to his automobile and awaited the end of the meeting.

At the meeting, Duvier informed the drivers of the contemplated change in ownership. On the following night, July 30, Respondent held another meeting with the drivers. At this meeting, Duvier indicated a desire to hire the drivers, but made it clear that Respondent would deal with them only as "free agents" and on an individual basis, at a rate below that set by the contract. The drivers asked for an opportunity to consider the offer. On the following day, July 31, the drivers discussed the offer among themselves, and the union steward, Olive, discussed it with Business Agent Sloan. The five drivers decided that they would still like to be represented by the Union and that they would insist on their contract rights. That evening Olive informed Duvier of the drivers' decision and told him that if the Respondent wanted to discuss the matter further, it should contact Sloan.

The Respondent did not contact Sloan, but on the following day, August 1, the Respondent hired five new drivers. On August 6, Sloan visited the offices of the Respondent's attorney in an effort to convince him of his obligation to bargain, but the Respondent's attorney refused to concede that there was any obligation to do so.

On these facts the Trial Examiner found that the Respondent had not violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. He based his conclusion that the Respondent had not violated Section 8(a)(3) of the Act on his finding that the Respondent's offer of a lower rate of pay was motivated by economic considerations and not by opposition to the

union activities of the five drivers. He based his dismissal of the charge that Respondent had violated Section 8(a) (5) of the Act on his conclusion that the five drivers had never become the "employees" of the Respondent. We agree with the Trial Examiner's conclusion that the Respondent did not violate Section 8(a) (3) of the Act, but we do not agree that the Respondent's conduct did not constitute a violation of Section 8(a) (5) of the Act.¹

In the *Phelps Dodge* case² the Supreme Court held that the term "employee" must be construed broadly. It pointed (pp. 191-192) to the broad language of Section 2(3), which defines the term "employee" as including "any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . .," and to the broad definition of "labor dispute" contained in Section 2(9), which states that such disputes may arise "regardless of whether the disputants stand in the proximate relation of employer and employee . . .," as clearly indicating a congressional intent that applicants for employment, and strikers who had obtained "regular and substantially equivalent employment" from another employer were "employees" within the meaning of the Act.

In *Hearst Publications*³ the Supreme Court affirmed its holding in *Phelps Dodge* that the definition of "employee"

¹ Member Brown would also find that the Respondent's failure to hire the five drivers was discriminatorily motivated. He regards the facts set forth above as clearly indicating that the Respondent's motive in offering the drivers a wage rate lower than that provided for in the collective-bargaining contract was to rid itself of the Union as the representative of its employees. He would therefore find that the Respondent violated Section 8(a) (3) of the Act. *New England Tank Industries, Inc.*, 133 NLRB 175, enfd. 302 F.2d 273 (C.A. 1), cert. denied 371 U.S. 875; *Piasecki Aircraft Corporation*, 123 NLRB 348, enfd. 280 F.2d 575 (C.A. 3); *Barney Wilkerson Construction Company*, 145 NLRB 704; *Alton-Arlan's Dept. Store, Inc.*, 150 NLRB 1303.

² *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177.

³ *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111.

must be given a broad meaning in keeping with the statute's broad terms and purposes. It rejected the contention that "technical concepts" of the employer-employee relationship should govern the interpretation of the term "employee" as used in the Act, and stated (p. 129) that the term:

. . . like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given.

And in committing to this Board the primary obligation for determining "where all the conditions of the relation require protection," the Court further stated (p. 130):

Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employer. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.

We think the circumstances of this case present an economic relationship "where all the conditions require protection" and where "protection ought to be given." The transaction between Tennessee Products and the Respondent represented nothing more than a change in ownership. Respondent continued to operate the plant with the same management, the same production employees, and the same trucks. The driving jobs for which the five drivers were not rehired remained the same. The Union and Tennessee Products had enjoyed stable labor relations and had executed collective-bargaining

contracts for a period of 10 years prior to the transfer of ownership. Thus the employing enterprise, of which the drivers were an integral part, remained the same after its acquisition by the Respondent. The Respondent, in fact, recognized the drivers' close relationship to the enterprise when it extended to the drivers preference in hiring, rather than immediately hiring replacements.

We think that where, as here, the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as "employees" of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment in the *Phelps Dodge* case. The particular individuals involved here were unquestionably "employees" of the enterprise at the time of the transfer of plant ownership. The work they had been doing was to be continued without change. Clearly employees in such a situation are entitled to seek through bargaining to protect their economic relationship to the enterprise that employs them. As the Supreme Court recently stated in another context:

Employees and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by

some protection to the employees from a sudden change in the employment relationship⁴

We therefore hold that the five drivers whom the Respondent did not hire were "his employees" within the meaning of Section 8(a)(5) of the Act.

Our conclusion that the drivers were "his employees" is buttressed by interpretations given the same phraseology in Section 8(b)(7) of the Act. That section provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of *his employees* [Emphasis supplied.]

In the *R. S. Noonan, Inc.*, case⁵ we held, with judicial approval, that the phrase included "future or prospective" employees where a union picketed in support of a demand for recognition and a contract at a time when the employer had no employees. In like vein we found in the *Cartage & Terminal* case,⁶ again with judicial approval,

⁴ *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549. The Supreme Court there decided that the arbitration provisions of a contract signed by the predecessor employer were binding upon the successor employer. Although we do not here decide the applicability of that holding to this case, we regard the above-quoted observation as pertinent to the issue now before us.

⁵ *Local 542, International Union of Operating Engineers, AFL-CIO (R. S. Noonan, Inc.)* 142 NLRB 1132, enfd. 331 F.2d 99 (C.A. 3).

⁶ *Local 705, International Brotherhood of Teamsters, etc. (Cartage & Terminal Management Corp.)*, 130 NLRB 558, enfd. 307 F.2d 197 (C.A.D.C.).

that picketing to force an employer to hire certain union members and to recognize the union as their representative was picketing to force the employer to recognize the union as the representative of "his employees" even though the union members had never been hired.⁷ We think it clear that the drivers herein bear a much closer relationship to the business enterprise than the "prospective" and "future" employees in the cases set forth above. And we perceive no reason here for distinguishing between Section 8(a)(5) and Section 8(b)(7) in the interpretation of the term "his employees" nor does "the Act explicitly state otherwise."

The record clearly shows, and the Trial Examiner found, that all five of the drivers were members of the Union and that the Respondent was fully aware of their membership and of their designation of the Union as their bargaining representative in an appropriate unit. Moreover, the drivers, by their insistence that the Respondent deal with the Union's business representative, clearly demonstrated their continued adherence to the Union when the Respondent, immediately before it took over the operations of the plant, sought to negotiate with them directly the terms and conditions of their continued employment. The drivers, as we have found above, were Respondent's employees within the meaning of the Act, and the Union represented all of them. The Respondent's failure to bargain with the Union upon request, its unilateral change in the wage rates offered the drivers, and its dealing individually with the drivers thus constituted, we hold, violations of Section 8(a)(5) of the Act.⁸

⁷ Compare *Sperry v. Local Union No. 562, Plumbing and Pipefitting*, 210 F. Supp. 743 (D.C. W. Mo.), where the court rejected as a defense the contention that, since the picketing was for the purpose of forcing recognition of the union with respect to future employees, it was therefore not for the purpose of representing "his employees."

⁸ We do not hold, as Member Jenkins suggests, that the purchaser of an enterprise is legally obligated to refrain from making any

Moreover, even were we persuaded that the phrase "his employees" in Section 8(a)(5) precludes our finding that Respondent violated that particular section of the Act, we would nevertheless find a violation of Section 8(a)(1) on the facts in this case. As has been shown above, during the interim period between the time it contracted for the purchase of the plant and the time it took physical possession, Respondent, deliberately bypassing the Union, entered into direct dealings with the drivers concerning their continued tenure of employment and the terms and conditions of such continued employment. It is undisputed that the Union at least during that period still retained its statutory status as the employees' duly designated bargaining agent in an appropriate unit. Section 7 of the Act guarantees employees the right, *inter alia*, "to bargain collectively through representatives of their own choosing" with respect to matters affecting their employee interests. And that right, in turn, exacts a correlative obligation from one who would deal with represented employees as to such matters to deal with them through their statutory representative and not directly. (*Medo Photo Supply Corporation v. N.L.R.B.*, 321 U.S. 678). It is quite clear that when Respondent invited the drivers as a group to confer with it about their continuity of employment and rates of pay in the "employing industry" to which it was succeeding, it was acting in an employer capacity, and this is so regardless of whether the employees were yet Respondent's employees

changes in the employment status of his predecessor's employees or to continue their employment under existing terms and conditions of employment. Rather we hold that, in circumstances such as those described above, the purchaser may not ignore the employees' collective-bargaining representative in dealing with them as to matters related to the continuation of their employment and the terms and conditions of such employment.

To the extent that *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, and similar cases may be inconsistent herewith, they are hereby overruled.

in a literal sense. Moreover, the subjects about which Respondent engaged in direct dealings with the drivers, though concerned with terms and conditions of employment that were not to be applicable until Respondent actually took over the plant, involved nonetheless matters as to the negotiation of which the employees had a legitimate right and interest to be represented by their bargaining agent.⁹ Having itself elected during the interim period referred to above to deal with the employees on matters properly a subject for collective bargaining, Respondent could not at the same time lawfully disregard the employees' statutory right to bargain through their then currently duly designated bargaining representative. Respondent's insistence upon bypassing the Union and dealing with the employees directly and, even more so, its flouting of the employees' expressed desire to be represented by the Union in such negotiations, constituted, it is found, a clear infringement of the employees' Section 7 rights, and as such was violative of Section 8 (a) (1).

THE REMEDY

We have found that the Respondent, by refusing, upon request, to recognize and bargain with the Union as the representative of its drivers, by unilaterally changing the drivers' wages, and by bypassing the Union and dealing

⁹ The Board has held that where an appropriate bargaining unit remains the same, the mere change of ownership of an "employing industry" is not alone such a change of circumstances as to affect the representative status of the bargaining agent or its right to represent the employees in the unit taken over with respect to the terms and conditions of their continuing employment. See, e.g., *Johnson Ready Mix Co.*, 142 NLRB 437; *Maintenance, Incorporated*, 148 NLRB 1299. In this case, it is apparent that when Respondent invited the drivers as a group to confer with it concerning the terms and conditions on which it would continue their employment, it at least contemplated the possibility of taking over as a unit the entire crew of drivers to perform the same work they had done in the past.

directly with the drivers as individuals, violated Section 8(a) (5) and (1). In fashioning a remedy, we must bear in mind that the remedy should be adapted to the situation that calls for redress, and with a view toward restoring, as nearly as possible, the situation to that which would have prevailed but for the unfair labor practices.¹⁰ We shall, of course, order the Respondent to cease and desist from the unfair labor practices found, and, affirmatively, upon request, to bargain with the Union concerning the drivers' wages, hours, and other conditions of employment. Moreover, it is clear that if the Respondent had honored its bargaining obligation and not infringed upon the employees' statutory rights, as found above, the drivers would not have been terminated without the protection afforded them through collective bargaining with their union about their wages and the continuation of their employment. They would have retained their jobs at least until the Respondent had completely fulfilled its bargaining obligation, and it is well within the realm of possibility that as the result of such bargaining they might not have been terminated at all. Effectuation of the purposes of the Act requires that employees whose statutory rights have been invaded by reason of the Respondent's unlawful action, and who have suffered loss of employment by reason thereof, shall if possible be restored to the employment status they enjoyed prior to such unlawful action. The Respondent in this case has continued to operate the enterprise in the same manner as its predecessor, and to use the services of employees in the work which its terminated drivers performed. Accordingly we shall order the Respondent to offer the drivers reinstatement to their former or substantially equivalent employment, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings suffered as a result of

¹⁰ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194.

the Respondent's unlawful action.¹¹ As it is speculative, and cannot be determined, what rate or rates of pay might have governed their employment had the Respondent fulfilled its obligation to bargain with their representative, and as in any event their existing rate could not have been changed until and unless the Respondent has fulfilled its bargaining obligation, we shall direct that backpay due them shall be computed at the rate provided in the contract governing their employee relationship at the time the Respondent acquired the enterprise.¹² Backpay shall further be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289; *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344; with interest added thereto in the amount and in the manner set forth in *Isis Plumbing and Heating Co.*, 138 NLRB 716.¹³

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All over-the-road truckdrivers employed by the Respondent at its Nashville, Tennessee, plant, excluding all other employees, office clerical employees, professional and technical employees, guards, watchmen, and supervisors, as defined in the Act, constitute a unit appropriate for the

¹¹ Cf. *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Fibreboard Paper Products Corp.*, 138 NLRB 550, enfd. *sub nom. East Bay Union of Machinists, Local 1304, etc.*, 322 F.2d 411 (C.A.D.C.).

¹² Cf. *New England Tank Industries, Inc.*, 147 NLRB 598.

¹³ We deem the remedy set forth above to be appropriate and necessary to effectuate the purposes of the Act, whether the conduct of the Respondent herein described be regarded as violative of Section 8(a)(1) or Section 8(a)(5), or as found above, of both.

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union upon request concerning the continued tenure of employment and terms and conditions of employment of drivers in the aforesaid bargaining unit; by unilaterally changing wages of employees in said unit without prior notice to, or consultation with the Union; and by bypassing the Union and dealing directly with employees concerning matters properly the subject of collective bargaining, in derogation of the employees' Section 7 rights, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Chemrock Corporation, Nashville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of a unit com-

posed of all over-the-road truckdrivers employed by the Respondent at its Nashville, Tennessee, plant, excluding all other employees, office clerical employees, professional and technical employees, guards, watchmen, and supervisors, as defined in the Act.

(b) Instituting changes in the rates of pay of employees in the aforesaid appropriate unit without first consulting with and bargaining with the Union as the exclusive bargaining representative.

(c) Bargaining directly with employees, who are then represented by the Union, or any other labor organization, as an exclusive collective-bargaining agent, with respect to rates of pay, or other terms or conditions of employment, in disregard of the representative status of their exclusive collective-bargaining representative.

(d) Interfering, in any other manner, with the efforts of the exclusive collective-bargaining representative to negotiate for or to represent the employees in the aforesaid bargaining unit as their exclusive bargaining agent.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Bargain collectively, upon request, with Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as

the exclusive representative of the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to William E. Olive, Doyle E. Maynard, S. Q. Willis, James B. Nelson, and Otis Shadix immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay, dismissing, if necessary, to provide employment for those offered and accepting employment, truckdrivers presently employed at Respondent's Nashville, Tennessee, operation.

(c) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, all payroll records and other records in the Respondent's possession necessary for the computation of lost earnings due hereunder.

(e) Post at its plant in Nashville, Tennessee, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 26, shall, after being duly signed by a representative of Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by

the Respondent to insure that said notices are not altered, defaced, or covered by any other material.¹⁴

(f) Notify the Regional Director for Region 26, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER JENKINS, concurring and dissenting:

I agree that the Respondent's conduct during the interim period between the time it contracted for the purchase of the plant and the time it took physical possession constituted a violation of Section 8(a)(1) of the Act. I do not agree with the conclusion that Respondent also violated Section 8(a)(5).¹⁵

The majority has concluded that a purchaser of an enterprise motivated solely by economic considerations and who expressly disclaims in the contract of sale the assumption of any obligations of the seller nonetheless acquires as its own employees all the seller's employees and is legally bound under the Act to hire the employees at the same wage rates. Plainly stated, the majority has held that a purchaser purchases the seller's contractual obligations with respect to the seller's employees and is not free to hire his own employees.

There is no gainsaying that the Respondent offered the drivers employment, albeit at a lower wage rate, and that

¹⁴ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

¹⁵ The Trial Examiner found "on the credible, undenied and uncontested evidence . . . that Chemrock's motive in offering the drivers less money for their services was purely economic, an effort to start the new corporation off on a transportation cost equality with its competitors," and concluded that "for economic reasons important to it" Respondent sought "to set the original wages of the drivers it would employ." The record amply supports the Trial Examiner in this regard; therefore, I agree that Respondent did not violate Section 8(a)(3) of the Act.

by not reporting for work they refused the offer. Thus, in my view they never became employees of Respondent. Therefore Respondent was under no duty to bargain with the Union. The majority, characterizing the sale between Tennessee Products and Respondent as "nothing more than a change in ownership," concludes that the drivers "must be regarded as employees of the purchaser as that term is used in the Act." Recognizing, however, that Section 8(a)(5) requires an employer to bargain with "his employees," they rely on Supreme Court decisions defining the term "employees" generally in wholly different contexts and conclude that the drivers who refused Respondent's offer of employment were "his employees" within the meaning of Section 8(a)(5).

The cases relied on neither compel nor suggest such a result. The issue in *Phelps Dodge*,¹⁶ which gave rise to the Court's interpretation of the term "employee," was whether an employer may refuse to hire employees solely because of their affiliation with a labor organization. In *Hearst Publications*,¹⁷ the issue was whether the newsboys were "employees" of Hearst or "independent contractors," the employer contending that the common law standards were applicable. The rejection of technical legal concepts and the adoption of a broad construction by the Court in defining the term "employee" in those cases do not furnish a basis for expanding the scope of the term "his employees" as used in Section 8(a)(5). Nor does the Court's statement in *Phelps Dodge*, seized on by the majority, that "[W]here all the conditions of the relation require protection, protection ought to be given" afford a legal basis for such an interpretation.

The majority "buttresses" its conclusion by relying on interpretations of the term "his employees" as used in

¹⁶ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177.

¹⁷ *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111.

Section 8(b) (7) of the Act. Such reliance is even more misplaced than that on *Phelps Dodge* and *Hearst Publications*, *supra*. Other than being the "same phraseology," the interpretation of the term "his employees", as used in Section 8(b) (7) by the Board and courts, casts no light whatsoever on the scope of the meaning of that term as used in Section 8(a) (5) of the Act. Section 8(b) (7) was enacted by Congress to provide sanctions for what it deemed to be unfair labor practices arising out of organizational and recognition picketing for specifically proscribed objects. I agree that in that context the term may include "future or prospective" employees in order fully to effectuate the purpose of that section. In my view, to give a similar interpretation to Section 8(a) (5) merely because the phraseology is the same is to make a fortress of the dictionary.

Finally, the majority has placed an unnecessary, and in some cases fatal, restraint on the free alienation of business enterprises or parts thereof. If a prospective buyer is not free to structure a new enterprise in such manner as will in his judgment convert a failing or non-profitable operation into a competitive and profitable venture, the likelihood that a business may be shut down or sharply curtailed by the prospective seller becomes greater. Compelling a purchaser to hire the employees of the seller further encumbers stagnant and unprofitable enterprises by reducing the flexibility available to prospective buyers and tends to foreclose any rejuvenation which might result from sales to new owner-managers.

Concluding as I do that the drivers never acquired the status of employees of Respondent, I would find no violation of Section 8(a) (5) here.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the purposes of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT refuse to bargain collectively with Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT institute changes in the rates of pay of employees in the aforesaid bargaining unit without first consulting with and bargaining with the above-named organization.

WE WILL NOT bargain directly with employees, who are then represented by the Union, or any other labor organization, with respect to rates of pay or other terms or conditions of employment in disregard of the representative status of their exclusive collective-bargaining representatives.

WE WILL NOT interfere, in any other manner, with the efforts of the exclusive collective-bargaining representative to negotiate for or to represent the employees in the aforesaid bargaining unit as their exclusive bargaining agent.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and

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to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL, upon request, bargain collectively with the said Union as the exclusive representative of all our employees in the appropriate unit with respect to wage increases and related matters, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All over-the-road truckdrivers employed by the Respondent at its Nashville, Tennessee, plant, excluding all other employees, office clerical employees, professional and technical employees, guards, watchmen, and supervisors, as defined in the Act.

WE WILL offer to William E. Olive, Doyle E. Maynard, S. Q. Willis, James B. Nelson, and Otis Shadix immediate and full reinstatement to their former, or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and will make them whole for any loss of pay they may have suffered by reason of unfair labor practices as found by the National Labor Relations Board.

CHEMROCK CORPORATION,
Employer.

Dated _____ By _____
(Representative) (Title)

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194 NLRB 841 (1972)

D-5818

Fort Bragg, N.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 11—CA—3949—1
11—CA—3949—2
11—CA—3949—3

SPRUCE UP CORPORATION

and

DAVID BROWN, an Individual
HECTOR HUNT, an Individual
JESSE WOMBLE, an Individual

and

Case 11—CA—4198

CICERO FOWLER t/a FOWLER'S BARBER SHOPS

and

JOURNEYMEN BARBERS, HAIR DRESSERS, COSMETOLOGISTS
AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA,
AFL-CIO, LOCAL 844

(SPRUCE UP I)

DECISION AND ORDER

On April 30, 1971, Trial Examiner Sidney Sherman issued the attached Decision in this proceeding. Thereafter, both Respondents filed exceptions and supporting briefs.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs

and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, except to the extent modified herein.¹

The Trial Examiner found, and we agree, that Respondent Cicero Fowler violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL-CIO, Local 844, in the appropriate unit of former Spruce Up employees, since February 26, 1970; dealing directly with such employees on February 27, 1970; and by unilaterally changing the commission rates of such employees on March 3, 1970.²

However, we disagree with the Trial Examiner's recommendation that Fowler be ordered to make the former Spruce Up employees whole from March 3, 1970.

The Trial Examiner found, and we agree, that the former Spruce Up employees became Fowler's employees, for the purposes of the Act, at the time he manifested an intent to retain them on February 26. However, instead of reporting for work on March 3 as directed in Fowler's offer, they concertedly withheld their services, and there-

¹ We find without merit Respondent Spruce Up's contention that litigation of the legality of its conduct in unilaterally changing the commission rates of its employees on October 22, 1969, is barred by Sec. 10(b) of the Act. Spruce Up's unilateral conduct on October 22, we find, was only one incident in a continuing pattern of conduct calculated to undermine the Union; it therefore related back and was encompassed by the original charges, which alleged not only unlawful discharges, but also "other acts" in violation of Sec. 8(a)(1). *Fant Milling Co.*, 360 U.S. 301; *Russell-Newman Mfg. Co., Inc.*, 167 NLRB 1112, *affd.* 406 F.2d 1280 (C.A. 5); *Fremont Hotel, Inc.*, 162 NLRB 820.

² We hereby deny Respondent Cicero Fowler's request for a rehearing, since he has advanced no newly discovered and previously unavailable relevant facts or circumstances which would warrant one.

by became strikers. As such, they are not entitled to backpay for the period during which they were on strike.

It is clear from the record that the former Spruce Up employees who concertedly refused to work for Fowler did so because of Fowler's unlawful conduct in unilaterally attaching conditions to such offer, tendering it to the employees individually, and refusing to recognize and bargain with their Union regarding such changes. In these circumstances, we find that these employees were unfair labor practice strikers on and after March 3.

As unfair practice strikers, the former Spruce Up employees were entitled to reinstatement to their former positions or, if those positions were no longer available, to equivalent positions, at the time Fowler received their unconditional offer to return to work.³ The record shows that date to be May 28, 1970. Accordingly, we shall order Fowler to reinstate and make those employees whole from that date.⁴

We also disagree with the Trial Examiner's recommended formula for computing backpay, i.e., to adopt "whatever rate is negotiated between the Union and Fowler in their first contract or, if no agreement is reached, whatever rate is proposed by Fowler up to the point of good-faith impasse." To apply retroactively the terms of an agreement to be bargained out in the future, we believe, would result in both impeding and further delaying meaningful collective bargaining. It is also possible that Respondent would utilize any retroactive backpay liability to justify a minimum offer at any forthcoming negotiations with the Union.

³ *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333.

⁴ The remedy provided in *Chemrock Corporation*, 151 NLRB 1074, is not appropriate here because the employees involved in that case did not concertedly withhold their services, but were terminated by the successor employer.

We believe it will closest approach bringing about the *status quo ante*, and at the same time prevent any employee from being disadvantaged by Fowler's unlawful conduct, to order Fowler to pay backpay to the unfair labor practice strikers based on either the rate-price structure prevailing under Spruce Up, or the new rate-price structure established by Fowler, whichever results in the higher back pay to the individual employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondents, Spruce Up Corporation and Cicero Fowler, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Substitute the following for paragraph B, (2) (c), of the recommended Order:

"(c) In the manner prescribed in said Remedy section, as modified herein, make whole the foregoing employees and all others in the above-described unit, for any loss of earnings suffered as a result of Fowler's refusal on and after May 28, 1970, to accept their unconditional offer to return to work."

2. Substitute the attached notice for the Trial Examiner's Appendix B.

Dated, Washington, D.C. Jan. 5, 1972.

/s/ Edward B. Miller
EDWARD B. MILLER Chairman

/s/ John H. Fanning
JOHN H. FANNING Member

/s/ Ralph E. Kennedy
RALPH E. KENNEDY Member
National Labor Relations Board

[SEAL]

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TXD-86-71

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases Nos. 11-CA-3949-1
11-CA-3949-2
11-CA-3949-3

SPRUCE UP CORPORATION

and

DAVID BROWN, AN INDIVIDUAL
HECTOR HUNT, AN INDIVIDUAL
JESSE WOMBLE, AN INDIVIDUAL

and

Case No. 11-CA-4198

CICERO FOWLER T/A FOWLER'S BARBER SHOPS

and

JOURNEYMEN BARBERS, HAIR DRESSERS, COSMETOLOGISTS
AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA,
AFL-CIO, LOCAL 844

ERRATUM

The Trial Examiner's Decision in the above case, which
issued on April 30, 1971, is hereby corrected as follows:

On page 26, line 11, change "its employees" to "the
employees".

/s/ Sidney Sherman
SIDEY SHERMAN
Trial Examiner

Dated: May 5, 1971
Washington, D.C.

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TXD-86-71

Fort Bragg, N.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases Nos. 11-CA-3349-1
11-CA-3949-2
11-CA-3949-3

SPRUCE UP CORPORATION

and

DAVID BROWN, AN INDIVIDUAL
HECTOR HUNT, AN INDIVIDUAL
JESSE WOMBLE, AN INDIVIDUAL

and

Case No. 11-CA-4198

CICERO FOWLER T/A FOWLER'S BARBER SHOPS

and

JOURNEYMEN BARBERS, HAIR DRESSERS, COSMETOLOGISTS
AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA,
AFL-CIO, LOCAL 844¹

Martin Ball, Esq., for the General Counsel.

Donald R. Holley, Esq., Miami, Fla., for Respondent
Spruce-Up Corporation.

Edward J. David, Esq., Fayetteville, N.C., for Respondent
Fowler.

¹ The name of the Charging Union has been amended to conform
to what seems to be its correct name. See 181 NLRB No. 108.

S. M. Charone, Esq., Chicago, Ill., and Charles H. Kirkman, Esq., Fayetteville, N.C., for the Charging Parties.

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The charges herein against Spruce Up Corporation were served upon it on July 17, 1969, the charge against Fowler was served upon him on March 27, 1970,² the complaints issued on August 29, 1969, and May 28, respectively, and an order consolidating both complaints for hearing was issued on the latter date. The proceeding was heard on October 13 and 14. After the hearing briefs were filed by Fowler and the General Counsel. The issues litigated related to alleged violations of Section 8(a) (1), (3) and (5).

Upon the entire record,³ including observation of the witnesses' demeanor, the following findings and recommendations are made:

I. The Respondents

Spruce Up Corporation, hereinafter called Spruce Up, is a Florida corporation with a principal office in Miami, Florida. It has been engaged in the operation of barber shops at military installations in several States. From March 3, 1969, through March 2, 1970, it operated 19 barber shops at Fort Bragg, North Carolina, pursuant to a contract with the United States Army and Air Force Exchange Service, hereinafter called the Exchange Service, and the instant proceeding concerns, *inter alia*, such operation. Spruce Up's gross monthly receipts from its

² All dates hereinafter are in 1970, unless otherwise stated.

³ For corrections of the transcript, see the order of December 9, and my letter of the same date. See, also, that order and the telegraphic order of April 19, 1971, relative to the receipt in evidence of Trial Examiner's Exhibits 1 and 2.

Fort Bragg shops approximated \$60,000, and on August 29, 1969, when the complaint against Spruce Up issued, it had a projected gross annual income from these shops alone in excess of \$500,000.

In a prior case it was found that Spruce Up's services at Fort Bragg were supplied exclusively to military personnel at a special rate, and were essential to members of the Armed Forces, and that Spruce Up's operations exerted a substantial impact on the national defense.⁴ It was there concluded that Spruce Up was an employer engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction over it. It is so found here.

Cicero Fowler, trading as Fowler's Barber Shops, hereinafter called Fowler, is an individual proprietor with offices at Fayetteville, North Carolina, and has since March 3, been engaged at Fort Bragg, North Carolina, in the operation of about 25 barber shops (including those formerly operated by Spruce Up) pursuant to a contract with the Exchange Service to furnish barbering services to military personnel at that Fort, and the projected annual gross revenue that will accrue to Fowler from such services exceeds \$500,000. The record shows, moreover, that Fowler has leased equipment for his shops from a supplier in North Carolina, who in turn has obtained 60 percent of such equipment directly from out-of-State sources, and that the annual rental paid by Fowler which is allocable to such out-of-State equipment is \$18,000.

There seems to be no basis for distinguishing Fowler's situation from Spruce Up's for jurisdictional purposes. It is accordingly found that Fowler is engaged in commerce under the Act and that it will effectuate the policies of the Act to assert jurisdiction over him.

⁴ 181 NLRB No. 108.

II. The Union

Journeyman Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL-CIO, Local 844, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

A. The Issues

The pleadings raise the following issues:

1. Whether Spruce Up violated Section 8(a)(1) of the Act by interrogation, threats of reprisal and promises of benefit?
2. Whether Spruce Up violated Section 8(a)(5) and (1) of the Act by unilateral changes in wage rates?
3. Whether Spruce Up violated Section 8(a)(3) and (1) of the Act by the discharge of Brown, Womble, and Hunt?
4. Whether Fowler violated Section 8(a)(5) and (1) by refusing to recognize the Union, by the unilateral setting of wage rates, and by attempting to negotiate, and negotiating, directly with individual unit employees?
5. Whether Fowler violated Section 8(a)(3) and (1) in not hiring certain individuals on March 3, and by rejecting an application for hire made by a number of them on May 27?

B. Sequence of Events

For many years the barbering at Fort Bragg has been handled by concessionaires selected periodically by the Exchange Service on the basis of competitive bids. In March 1969, there were 27 barber shops at the Fort, 19 of which were operated by Spruce Up, and the balance by Roscoe and by Fisher. The Spruce Up shops were the

object of a Union organizing campaign, which culminated in a Board election on July 25, 1969, and certification of the Union on August 4, 1969. Spruce Up thereafter refused to bargain with the Union, necessitating a complaint proceeding before the Board, in which it was alleged that Spruce Up violated Section 8(a)(5) and (1) of the Act by the following conduct:

1. Refusing to meet with the Union on or about August 19, 1969.
2. Unilaterally changing employee commission percentages on or about August 27, 1969.
3. Unilaterally changing the salaries of unit employees on or about September 2, 1969.

Spruce Up defended, *inter alia*, on the ground that certain individuals described as "shop managers" and "co-managers" were supervisors and had been improperly included in the certified unit. The General Counsel moved for summary judgment. On March 18, rejecting for the purpose of that case only the contention that the various managers were supervisors,⁵ the Board granted the General Counsel's motion insofar as it was based on the refusal by Spruce Up to meet with the Union. However, as to the allegations of unilateral action, the Board said:

Respondent's answer denied generally the allegations in the complaint that it unilaterally changed commission percentages and salaries. It also raised certain affirmative defenses which it argues should be

⁵ The Board stated that that issue had been sufficiently litigated before the Regional Director in the representation case, and that the Board was convinced from an independent examination of the record made in that case that the Regional Director's determination that the various managers were not supervisors was correct. However, the Board made it clear that Respondent was not foreclosed from litigating that issue in the instant case (which was then pending), in defending against the charge of discrimination against certain of the managers. *Spruce Up Corporation*, 181 NLRB No. 108.

resolved only after a hearing. The record before us is insufficient to resolve the factual and legal issues presented. Ordinarily, in such a case, we would deny Summary Judgment and remand for a hearing. However, as the alleged unlawful unilateral action is unaccompanied by special circumstances that would justify further proceedings, we have decided, in the interest of sound administrative practice, to dismiss the allegations based upon such unilateral changes. In doing so we have also relied upon the fact that compliance with our bargaining order herein will preclude Respondent from engaging in further unilateral action. Accordingly, it does not appear that further proceedings will effectuate statutory policies and therefore we shall dismiss the complaint insofar as it alleges 8(a)(5) violations based upon unilateral changes in commission rates and salaries.

Thus, in the belief that any findings with respect to the alleged unilateral action would not affect the remedy and would merely delay the final disposition of the case, the Board decided to eliminate the issue by dismissing that part of the case.

As already noted, the foregoing Decision and Order issued on March 18. Meanwhile, on March 3, Spruce Up had been succeeded at Fort Bragg by a new concessionaire, Fowler, who was not only awarded the 19 shops formerly operated by Spruce Up, but also the 8 other shops that had been managed by Roscoe and by Fisher. On February 27, in anticipation of his takeover, Fowler distributed to the barbers of all 27 shops individual form letters proposing to hire them on March 3, at a specified rate of commission, which was in many cases less than their existing rate,⁶ and requesting that

⁶ However, since Fowler's contract with the Exchange Service allowed him to charge more for each haircut, it is not clear whether the reduction in percentage would have resulted in any reduction in take home pay.

they return the letter with their signature, if they desired to work on that basis. On March 2, at a meeting called by the Union and attended by most of the barbers from all 27 shops, the men voted not to sign the form letter, and to withhold their services and picket the base. The next day, the majority of the barbers failed to report to Fowler and picket lines were set up at the entrance to the base. However, by May 27, about half of these barbers had returned to work, and on that date the rest offered to return, but none of the latter group has been hired.

C. Discussion

1. The 8(a)(1) issues as to Spruce Up

a. *Interrogation, threats and promises*

There is no serious dispute, and it is found, that during a period of several months before the election of July 25, 1969, Spruce Up's general manager, Hale, interrogated a number of employees about their Union sentiments, promised one of them certain benefits to induce him to reject the Union, attributed a reduction in employee commissions to the advent of the Union, warned two of the barbers that their commission rates would be reduced if they supported the Union, and threatened employees with more onerous working conditions under a union.⁷

⁷ The General Counsel contended that Spruce Up further violated Section 8(a)(1) by speeches delivered to a group of employees by Hale on July 9, 1969, and by Spruce Up's legal counsel, Holley, on July 17, 1969. The record shows that Hale then told the employees that, if the Union won the election on July 25, Spruce Up would pack up and leave after its current contract with the Army expired. However, most, if not all, the barbers in Hale's audience had survived a number of changes in concessionaires at Fort Bragg, the practice being for a new concessionaire to hire all the employees of his predecessor. Thus, it is not clear how Hale's statement could have been regarded by the barbers as a threat to their tenure. As for Holley, various employees attributed to him a warning that,

b. *Changes in pay rates*

As already related, Spruce Up was found by the Board in the earlier case to have violated Section 8(a)(5) and (1) of the Act by refusing since August 19, 1969, to bargain with the Union as the representative of the employees in the certified unit, which consisted of the barbers in Spruce Up's 19 shops at Fort Bragg. At the same time the Board, without passing on the merits thereof, dismissed the allegations of violations by Spruce Up of Section 8(a)(5) and (1) through unilateral changes in pay rates on August 27, and September 2, 1969. The General Counsel attempted at the instant hearing to litigate the issue whether the August 27, and September 2, actions violated Section 8(a)(1).⁸ While one may well question the validity of the basis cited by the Board for dismissing those allegations in the prior case, even after it was apprised that the case involved alleged *reductions* in pay and a claim for backpay,⁹ this

even if the Union won the election, Spruce Up could "stall" until the expiration of the term of its concession, thereby implying that the election was merely an exercise in futility. While Holley denied under oath that he made such a statement, he admitted from counsel table that he did on that occasion describe to the employees the various time-consuming appeal procedures and other legal remedies that Spruce Up was entitled to exhaust before it could be compelled to bargain, and one would have been obtuse, indeed, not to perceive that such legal maneuvers might well extend beyond the term of Spruce Up's current Army contract. However, as I am reluctant to deny to an employer the right to advise employees of what he may lawfully do to test the validity of a union's certification, I base no violation finding on Holley's remarks.

⁸ In the instant complaint the unilateral action alleged was described as a *reduction* in rates, whereas the complaint in the earlier case referred only to "changes" in rates. However, in that case, in his response to the Union's motion to the Board for reconsideration of its dismissal action, the General Counsel made it clear that he proposed to prove reductions in pay. Accordingly this difference between the language of two complaints would not seem to be significant for the purpose of applying the rule of *res judicata*.

⁹ See preceding footnote.

Examiner deems himself bound by such action. It may well be that under common law rules such dismissal by the Board would not be deemed to be *res judicata*, because the Board did not reach the merits of the dismissed allegations. However, under Rule 41(b) of the Federal Rules of Civil Procedure, absent a stipulation to the contrary in the order of dismissal, such action is deemed to be with prejudice.¹⁰ There was no such stipulation in the Board's order in the prior case. While nothing in the Act subjects the Board to the mandatory application of the Federal Rules, the Board generally follows them, absent compelling policy considerations to the contrary. In view of the foregoing considerations, I ruled at the hearing that the General Counsel could not relitigate the issues as to the alleged reduction in commissions on August 27 and September 2, and those allegations were struck. However, it was not my intent, nor have I the power, to foreclose the Board from reopening the record in the prior case on its own motion or on the motion of a party and permitting the issues as to the August 27 and September 2 pay actions to be litigated on their merits.

Based upon information obtained at the hearing, the General Counsel amended the complaint to allege that on October 22, 1969, Spruce Up unilaterally instituted changes in commission rates, thereby violating Section 8(a)(1). As that issue was not before the Board in the prior case, I ruled that it might properly be litigated in the case at bar. It was conceded at the hearing that on October 22, 1969, Spruce Up did effect widespread changes in commission rates and it is clear that the

¹⁰ Insofar as here pertinent, Rule 41(b) provides:

Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Union was not consulted about such changes, although it was at the time the statutory representative of Spruce Up's employees. It is found that such by-passing of the Union in a matter vital to the interests of the employees was calculated to discredit, and derogate from the status of, the Union, and that Spruce Up thereby further violated Section 8(a)(1) of the Act.

2. The discharge by Spruce Up

The General Counsel contends that Spruce Up violated Section 8(a)(3) and (1) by its discharge of Hunt about May 1, 1969, and of Brown and Womble on July 14, 1969. All three were Union officers.

Brown and Womble

In the morning of July 9, Hale called a meeting of the shop managers in his office, in the course of which he appealed to them to reject the Union in the forthcoming election. After the speech, the managers congregated on the street near Hale's office and discussed his remarks. The next day it was reported to Hale that this street meeting had continued for at least 15 minutes, that Brown and Womble had done all the talking, and that the tenor of their remarks was favorable to the Union. On July 14, Hale discharged the two men, citing their Union activity on the foregoing occasion. At the hearing, Hale contended at first that he was concerned only about the fact that Brown and Womble had detained the others from returning to work. However, he acknowledged that, if the subject of their remarks had been some matter not pertaining to the Union, he would not have discharged them. In any case, in view of the plethora of evidence as to the liberality of Spruce Up's policy regarding taking time off from work for personal reasons it would be difficult to believe that Hale was so exercised about a relatively brief delay on the part of the managers in returning to their shops that he would sum-

marily discharge two of them for that reason.¹¹ It is found that their discharge violated Section 8(a)(3) and (1).

Hunt

Hunt was the president of the Union and on March 10, 1969, informed Hale of that fact. On March 26, while still engaged in managing one of Spruce Up's shops, Hunt opened his own barber shop off the base, which shop was operated by his son. On April 6, Hunt was granted sick leave by Hale, and was hospitalized for treatment of an arthritic condition. He was discharged from the hospital on April 14, and, according to Hunt, he thereafter worked only occasionally at barbering for Spruce Up, being still hampered by his disability, and, in addition, with Hale's consent, assisted in the record-keeping work at the shop on a volunteer basis. On May 2, he was discharged by a letter from Hale, which cited his prolonged and unexplained absence from work since his discharge from the hospital.

Hale testified that he heard nothing from Hunt after his admission to the hospital; that, when, finally, on May 1, he called the hospital, he learned that Hunt had been discharged therefrom on April 14; that later, on May 1, he visited the shop operated for Hunt by his son and was told that Hunt had gone to the bank to make a deposit; and that, assuming that Hunt was no longer interested in working for Spruce Up, the witness decided to discharge him. Although Hunt admittedly was offered a job by Spruce Up on September 9, he did not return to work then.

¹¹ Brown had worked at the Fort for 17 years and Womble for 9 years. Both men were rehired in September, after charges had been filed on account of their termination. The General Counsel contends that their reinstatement was not to their former positions and that they suffered loss of earnings on that account. However, that issue may be resolved in the compliance stage of this proceeding.

It appears from the foregoing that the only substantial conflict between Hunt and Hale was as to whether Hunt did in fact contact Hale after his discharge from the hospital and explain to him, as Hunt contended, that he could not cut hair because of his arthritis but would assist in the record-keeping work on a volunteer basis. However, even if Hunt's version be credited,¹² it is clear that he gave Hale no assurance as to when, if ever, he could resume his normal duties, and there was no contradiction of Hale's testimony that on May 1, he was given reason to believe that Hunt was taking an active part in the operation of his own shop. Under the circumstances, Hale was justified, in any case, in believing that there was no foreseeable prospect of Hunt returning to Spruce Up, as a barber, and there is no evidence or contention that Hale treated Hunt any differently than he would have treated any one else under the same circumstances, whether or not a Union adherent. Accordingly, the evidence is not deemed to preponderate in favor of a finding of discrimination against Hunt, and dismissal of the pertinent allegation will be recommended.

3. The 8(a)(5) issue as to Fowler

The complaint alleged that Fowler violated Section 8(a)(5) and (1) by the following conduct:

1. Refusing since February 6, to bargain with the Union with respect to the unit for which the Union was certified.

2. On or about March 3, effecting unilateral changes in commission rates.

¹² There was no contradiction of Hale's testimony that, when Hunt came to Hale's office to collect some belongings, Hunt did not take issue with any of the assertions in the discharge letter. This circumstance weighs in favor of Hale's version and I would credit him, if it were necessary to resolve the aforementioned conflicts in the testimony.

3. On or about February 27, attempting to negotiate, and negotiating, terms and conditions of employment directly with individual employees in the appropriate unit.

While not disputing the allegation that he has refused since February 6 to bargain with the Union, Fowler contended that, in no event, did he have any duty to bargain before March 3, because he did not become an employer until that date; and, Fowler defended his admitted refusal to bargain after that date on the ground that the Union's certification was not binding upon him.

As to the pertinent events before the March 3 takeover, the record shows that on February 26, the Union and Fowler met to discuss the issues of recognition of the Union as the representative of the barbers covered by its certification, and that Fowler refused recognition on the ground that the Spruce Up employees were not yet his employees, that he was therefore under no obligation to bargain with respect to them until the takeover on March 3, and that after that date there would be a "different situation." Fowler also announced at that time his intention to notify each of the Spruce Up employees the next day by letter of the new commission rates to be paid by him, which would be based on the new, higher price for haircuts, that those who wished to work for him would be required to so indicate by signing and returning that letter, and that no one would be hired unless he was willing to work at the rate offered. Fowler then reiterated his position that there was at that moment no "employment contract" between him and the barbers, and that, until there was, there was nothing to bargain about. The Union rejoined that, while the barbers desired to continue to work at the base, no assurance would be given as to how many would report to Fowler, if he persisted in his refusal to negotiate. Fowler, however, adhered to his aforesaid position.

Fowler's view that he had no duty to bargain before March 3, is consistent with the Board's position in *Page Aircraft Maintenance, Inc.*¹³ There, when a purchaser of a business refused to bargain with the representative of the seller's employees, in advance of the transfer of the business, such employees refused to report for work after the transfer. Subsequent bargaining requests were also rejected. Holding that the purchaser did not violate the Act by refusing to bargain before the transfer, the Board relied, *inter alia*, on the fact that Section 8(a)(5) requires that an employer bargain only with the representative of "his employees," and the Board found that the seller's employees could not have become employees of the purchaser before the transfer. As to the subsequent period, the Board found no unlawful refusal to bargain, relying, *inter alia*, on the fact that such of the seller's employees as did report for work after the transfer constituted a small minority of the purchaser's total complement.

However, in *Chemrock Corporation*,¹⁴ where all the seller's drivers declined to work for the purchaser because of his refusal to recognize the union before the transfer, the Board found that by such refusal, as well as by its contemporaneous announcement of a unilateral change in wage rates, the buyer violated Section 8(a)(5), and that, in any event, it independently violated Section 8(a)(1) by attempting to deal directly with the drivers before the transfer. Construing the requirement of Section 8(a)(5) that an employer bargain with respect to "his employees" in the light of the Supreme Court

¹³ 123 NLRB 159. Accord: *Piasecki Aircraft Corp.*, 123 NLRB 348, enf'd 280 F.2d 575 (C.A. 3) cert. den. 346 U.S. 933.

¹⁴ 151 NLRB 1074.

decisions in *Phelps Dodge*¹⁵ *Hearst*,¹⁶ and *Wiley*,¹⁷ the Board concluded that even before the transfer the drivers became employees of the purchaser within the meaning of Section 8(a)(5).¹⁸ The Board noted that it was overruling *Page Aircraft*, *supra*, to the extent that it was inconsistent with the foregoing result.

Thus, under the Board's most recent pronouncement on the point, it is apparent that where, as here, an employer who is about to acquire a going business manifests an intent to retain his predecessor's employees, they become at that point his employees for the purpose of the application of Section 8(a)(5), and he is obligated to bargain with a union which is the statutory representative of such employees. It is clear, moreover, that any attempt by him to deal directly with them, whether or not regarded as his employees, would violate Section 8(a)(1). Accordingly, Fowler's contention that he did not violate the Act, by refusing to recognize the Union or by his other conduct before the takeover, is rejected insofar as it relies on the proposition that none of the barbers had as yet become his employees.

The General Counsel urges, also, that, whether or not he was required to bargain before the takeover, Fowler was obligated to do so after that event. The General Counsel relies at this point on the Board's "successorship" doctrine, which is to the effect that one who takes over another employer's operation is bound by an outstanding Board certification covering the latter's employees, provided only that he continues to carry on substantially the same business with substantially the same personnel.

¹⁵ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177.

¹⁶ *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111.

¹⁷ *John Wiley & Sons v. Livingston*, 376 U.S. 543.

¹⁸ See, also, *Overnite Transportation Company, Inc.*, 157 NLRB 1185.

The record suggests certain problems with respect to the application of that rule, as follows:

- (1) The lack of privity between Fowler and Spruce Up.
- (2) The hiring by Fowler of "replacements" for those former Spruce Up employees who failed to report for work on March 3.
- (3) The inclusion in Fowler's operations of 8 shops not covered by the Union's certification.
- (4) The contention that Fowler's shop managers were supervisors.¹⁹

As for (1), above, it is true that there was no privity between Fowler and Spruce Up, since he acquired nothing by purchase from it but was awarded the barbering concession by the Exchange Service. However, it is well settled that the Board's rule as to the binding effect upon successors of prior certifications applies to a situation where, as here, there was no privity of contract between the successor and the predecessor.²⁰ Thus, in *Maintenance, Inc.*, *supra*, the Board said:

The duty of an employer who has taken over an "employing industry" to honor the employees' choice of a bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to [the

¹⁹ There is no substantial dispute that Fowler's operations in the old Spruce Up shops are identical with those formerly performed there. While Fowler was required to install new equipment, that does not prevent a finding of successorship. *Randolph Rubber Co., Inc.*, 152 NLRB 496, 499.

²⁰ *Maintenance, Inc.*, 148 NLRB 1299; *Emerald Maintenance, Inc.*, 188 NLRB No. 139.

predecessor's] corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit, whose duly certified bargaining agent was entitled to recognition at the time Respondent took over.

Accordingly, it is found that the absence of privity between Fowler and Spruce Up does not preclude considering Fowler to be bound by the Union's certification.

As to (2), above, a cardinal test of successorship, in the present context is whether a majority of the successor's employees were formerly employed by the predecessor.²¹ Here, Fowler testified at the hearing that, of the 64 or 65 barbers then in his employ, 43 were former employees of Spruce Up.²² The actual figures for the period March 13 to December 4 were as follows:

With regard to the crucial question of the proposition of former Spruce Up employees working for Fowler in the certified unit (consisting of all employees in the old Spruce Up shops), the record²³ shows that on March 3, 18 of the old Spruce Up employees reported to Fowler

²¹ E.g. *Johnson Ready Mix Co.*, 142 NLRB 437, 441.

²² As shown below, the correct figures for those working in the old Spruce Up shop were 32 old employees and 7 new. Fowler testified that only 30 of his current complement of "64 or 65" were "Union members." However, even if deemed to establish the Union's loss of majority status as of the date of the hearing, such testimony would not affect Fowler's duty as a successor to honor the certification at least until the end of the certification year. For, that duty is based on the ratio of former Spruce Up employees to others in the unit and not on the ratio of Union adherents to non-Union employees. *Johnson Ready Mix Co.*, *supra*; *Maintenance, Incorporated*, *supra*; *Colony Materials, Inc.*, 130 NLRB 105. As for the duration of the instant certification year, measured in terms of the calendar, it did not expire until August 4. Measured in terms of the Board order in the prior complaint case, the certification year has not yet begun to run.

²³ Trial Examiner's Exhibit 2.

and were assigned to those shops; that the next day Fowler began to hire replacements for those who had failed to report; that on March 10, there were 18 old employees and 17 replacements working in those shops; that on March 17, the ratio was 22 old employees and 26 replacements; and that on March 24, it was 20 to 28, on March 31, 21 to 26, and on April 7, 23 to 25. However on April 14, the ratio was 32 to 23 in favor of the old Spruce Up employees and they remained in the majority thereafter. Thus, on May 28, when the Union applied on behalf of the "strikers," the ratio was 34 to 18, and by December 4, it had risen to 32 to 7. It is apparent from the foregoing that the old Spruce Up employees represented the majority of the unit employees at all times except for the period from March 17, to April 14. Moreover, analysis of the tenure of both groups shows that, while nearly half of the "replacements" consisted of employees who worked only from 2 days to 2 months, only four of the old Spruce Up employees fell in this category. It is found therefore that the old Spruce Up employees not only preponderated in the certified unit during the bulk of the period since the takeover, but also constituted at all times a majority of "the stable nucleus" of that unit.²⁴ It follows that, notwithstanding the substitution of new hires for former Spruce Up employees, the complement working for Fowler in the old Spruce Up shops was substantially the same as it had been before the takeover.

As to (3), above, the fact that, in addition to the 19 Spruce Up shops, Fowler took over the 8 shops formerly operated by Roscoe Fisher raises a question as to the validity of the Union's bargaining request. The complaint

²⁴ See *Polytech, Incorporated*, 186 NLRB No. 148 (TXD, pp. 12-13). Note that that decision stressed the fact that the successor made every effort to hire all the predecessor's employees, a factor also present here.

alleges and the answer admits that such request was that Fowler bargain with respect to the certified unit, which was limited to the employees in the 19 shops formerly operated by Spruce Up and taken over by Fowler on March 3. Respondent urges that the employees in the old Roscoe and Fisher shops should be considered an accretion to that unit and that the Union's failure to include them within the scope of its request for recognition and bargaining should be deemed fatal. However, as of the date of Fowler's initial refusal of recognition—in February—the certified unit would seem to have been still appropriate, since at that time Roscoe and Fisher were still on the scene, there had not as yet been any consolidation of their operations with those of Spruce Up, and what changes would be effected by such consolidation were still speculative. Thus, the accretion issue is not deemed to have any bearing on Fowler's duty to recognize the Union before March 3, but only on the propriety of such recognition on and after that date. As to the latter period, the General Counsel made out a *prima facie* case by showing that Fowler, as found above, was a successor of Spruce Up, that, as such, he was not only bound by the Board's certification of the Union with respect to the old Spruce Up unit but also by the Board's order that Spruce Up and its successors bargain with the Union with respect to such unit, and that on and after March 3, he refused to comply with that order. No attempt was made to rebut such *prima facie* case by adducing evidence concerning any of the congeries of factors customarily considered by the Board in determining whether there is an accretion to an existing unit. See *Super Value Stores, Inc.*, 177 NLRB No. 63, 179 NLRB No. 76; *Almacs, Inc.*, 176 NLRB No. 127; *Super Markets General Corporation*, 170 NLRB No. 61.

In any event, I am aware of no case, and none has been cited, holding that an employer may refuse to bar-

gain with respect to a certified unit because that unit has been rendered inappropriate by an accretion thereto.²⁵

All things considered, no merit is found in the "accretion" contention.

As to the question of the supervisory status of Fowler's "managers," it appears that the certified unit included 18 shop managers and two co-managers, all of whom were found by the Board in the prior proceeding not to be supervisors. The exclusion of these 20 individuals from the unit would not have affected the outcome of the election.²⁶ The question still remains whether there was such a change in the managers' status under Fowler as would require their exclusion from the current unit or would render the certified unit inappropriate.

The only testimony on that issue was that of Fowler that, when he hired a manager, he informed him of his duties and that such duties included the recommending of applicants for employment and the granting of time off. However, Fowler acknowledged that no manager had as yet made any such recommendation, and that, in those cases where a job applicant initially contacted a manager, he had merely referred the applicant to Fowler.

²⁵ The accretion issue normally arises in the context of a dispute over the coverage of a collective contract, as where such a contract is urged as a bar to an election petition by a union seeking to represent separately the alleged "accretion" or where the extension of such contract to the alleged "accretion" is attacked as a form of unlawful assistance to the contracting union. The accretion issue has also been considered in the context of an employer refusal to bargain with respect to an accretion as part of a preexisting unit (*Springfield Electrotape Service, Inc.*, 169 NLRB 638; *J. W. Rex Co.*, 115 NLRB 775); and the Board has sustained the refusal of an employer to recognize a certified union on the ground that its unit had become an accretion to a different, certified unit. *Federal Electric Corporation*, 167 NLRB 469. However, no case has been found dealing with the precise issue here presented.

²⁶ There were 47 votes for the Union, 13 against, and 3 challenged ballots. See *Spruce Up Corporation*, *supra*.

As to time off, although in the representation case there was undisputed evidence that the managers had authority to grant time off, that circumstance was not deemed to constitute them supervisors. It is concluded that there was no significant change in the status of the managers under Fowler and they will be retained in the unit.

Accordingly, it is found that Fowler was bound by the Union's certification as Spruce Up's successor, that at least by February 26, the barbers in the instant unit had become "employees" of Fowler in an appropriate unit within the meaning of Section 8(a)(5), and that he was obligated on and after that date to recognize and bargain with the Union with respect to them. It follows that, by his admitted refusal to bargain since February 26, and by announcing unilateral changes in pay rates on that date and implementing such announcement on and after March 3, Fowler violated Section 8(a)(5) and (1) of the Act.²⁷ Moreover, by presenting to the barbers on February 27, individual, written offers to hire them at the new rates, Fowler engaged in direct dealing with them, thereby further violating Section 8(a)(5) and (1). Such conduct would, in any case, independently violate Section 8(a)(1), whether or not the barbers were deemed to have been employees of Fowler at the time.²⁸

4. The refusal of Fowler to employ certain barbers

As already related, on February 27, in contemplation of his takeover of the barbering concession on March 3, Fowler distributed to all the barbers at the Fort, including those working for Spruce Up, a form letter, offering to employ them at a specific commission rate, which was in many cases lower than their existing rate, albeit based on a higher price per haircut. The letter concluded:

²⁷ *Chemrock Corporation*, *supra*; *Interstate 65 Corporation*, 186 NLRB No. 41; *Emerald Maintenance, Inc.*, *supra*.

²⁸ *Chemrock Corporation*, *supra*.

I extend to you the opportunity for employment under the above mentioned terms. If you are willing to work for me, please sign at the bottom of this statement and return it to my office no later than 12:00 p.m.,²⁹ March 2nd, 1970.

On March 2, the Union called a meeting to discuss this letter, which meeting was attended by the bulk of the barbers then working at the Fort. A Union spokesman denounced the individual agreements proposed by Fowler as "yellow dog" contracts, and a motion was carried not to accept Fowler's offer and to engage in a "strike." During the ensuing weeks there was picketing by the barbers at the entrance to the Fort and, while some gave up the fight and straggled back to work earlier, others held out until May 27, when the Union wrote to Fowler as follows:

This is to advise that the following named individuals * * * hereby unconditionally offer to return to work for you at Fort Bragg * * * in the same position or a comparable position as before.

There followed the names of 22 barbers, who were identified in the letter as Union members, and of four others, who were described as persons "acting concertedly."³⁰ No reply was received to this letter and none of the persons named has been hired, except for two (Bethea and Bell), who were already working for Fowler on May 27, and were presumably included in the letter by mistake.

The General Counsel's primary contention is that all those barbers, 58 in number, who failed to report for work on March 3, should be found to have been discriminatorily discharged by Fowler, in violation of Sec-

²⁹ Fowler explained at the hearing that this meant 12 noon.

³⁰ These were former employees of Roscoe and Fisher, who had withheld their services out of sympathy with the others.

tion 8(a)(3) and (1) of the Act. They will be referred to hereinafter as "the 58 claimants." In addition, the General Counsel urges that, in any event, such of them as unsuccessfully applied to Fowler for employment on May 27, should be deemed to have been unlawfully refused employment. The latter group, 24 in number (excluding Bethea and Bell), will be hereinafter referred to as "the 24 claimants."

The General Counsel's primary contention is based on the proposition that the form letter distributed on February 27, unlawfully conditioned the employment of the barbers upon their waiving the protection of the Union in dealing with Fowler concerning wages and upon their entering into direct negotiations with Fowler concerning that subject, and that Fowler's refusal to employ them absent compliance with such conditions constituted in effect a refusal to hire for discriminatory reasons. However, in *Chemrock, supra*, while finding that the employer's offer to employ the drivers only at rates unilaterally fixed by him and only as "free agents" (i.e., without union representation) was unlawful, the Board ruled that the failure to hire the drivers, when they rejected such offer, was not violative of Section 8(a)(3) or (1). The considerations that led to that result would seem to apply here *a fortiori*.³¹ Accordingly, I will recommend dismissal of the allegation that the 58 claimants were discriminatorily denied employment.³² That decision

³¹ The Board adopted the Trial Examiner's finding that the offer to the drivers of a lower rate of pay than that fixed by their union contract was motivated solely by economic considerations and not by opposition to the union. Here, it is also clear that Fowler acted for economic reasons in reducing the percentage rate of the barbers' commissions, since he was at the same time raising the price of a haircut. Moreover, there is even less ground here than there was in *Chemrock* for finding that Fowler conditioned his offer of employment on renunciation of the Union.

³² However, notwithstanding such dismissal, it will be recommended, for reasons explained below, in the "Remedy" section, that

is even more clearly controlling with respect to those of the 58 claimants who prior to the takeover were not members of the certified unit, but employees of Roscoe and Fisher. As Fowler was under no duty to deal with them through the Union, he was free to fix their rates unilaterally and to require them to accept such rates as a condition of employment.

The General Counsel's alternative contention that it was unlawful for Fowler to refuse on May 28 to hire the 24 claimants, who applied for work on that date, presupposes that there was a concerted withholding of services by such individuals, which constituted a "strike" within the meaning of the Act and that such strike was caused or prolonged by unfair labor practices attributable to Fowler.³³

If both these assumptions are correct, it would follow that, as unfair labor practice strikers, the 24 claimants would be entitled to oust any persons hired to fill their former positions.³⁴

The question whether the withholding of services from Fowler by the 24 claimants should be treated as a "strike," even though they had never begun to work for him, involves the construction of a different statutory provision from that heretofore considered in the discussion of Section 8(a)(5) and of the duty thereby imposed upon an employer to bargain with respect to "employees" who had never worked for him. Section 501 of the Act

all those old Spruce Up barbers who failed to report on March 3, be granted backpay from that date, as well as reinstatement in those cases where they have not yet been hired by Fowler.

³³ It would have availed the General Counsel nothing to establish that the strike was an economic one, since there was no contradiction of Fowler's testimony, and I find, that he had no vacancies on or after the date of receipt of the Union's letter.

³⁴ As already noted, Fowler's records show that there were 18 such "replacements" in his employ on May 28.

defines the term "strike" as used in the Act as including "any strike or other concerted stoppage of work by employees . . . and any concerted slow-down or other interruption of operations by employees." The question is thus presented whether a concerted refusal to enter into a new employment relation may constitute a "strike" as defined above. This issue has had much the same history as the 8(a)(5) issue discussed above, the Board alternating between the view of the *Joliet Contractors* case³⁵ that a concerted withholding of services from a prospective employer was not a strike, and the more expansive view expressed in later cases that such withholding did constitute a strike, provided that there was a contract between such employer and a union governing the terms and conditions of work of the individuals involved, and the union controlled the employer's "exclusive source" of manpower.³⁶ Since the Board has not yet gone so far as to find a strike on the basis of a concerted refusal to accept new employment, without more, and there is nothing here that would bring this case within the rule of *L. B. Wilson Co.*, *supra*, and related cases, it is concluded that the rejection on March 3 of Fowler's offer of employment did not constitute a strike and that the 24 claimants were therefore not entitled to be treated as unfair labor practice strikers.

Accordingly, no violation of the Act is found in Fowler's refusal to hire the 24 claimants when they applied by letter of May 27.

³⁵ *Joliet Contractors' Association*, 99 NLRB 1391, aff'd 202 F.2d 608 (C.A. 6).

³⁶ *L. B. Wilson Co.*, 125 NLRB 786, remanded on other grounds, 285 F.2d 902 (C.A. 6); *Detroit Edison Co.*, 123 NLRB 225, enf. den. on this point, 278 F.2d 858 (C.A.D.C.).

See *Chemrock Corporation*, *supra*, at pp. 1081-1082, where the Board seems to have found, on facts similar to those in the case at bar, that the employees involved were "terminated," thereby rejecting, at least by implication, any contention that they should be treated as strikers.

IV. The Remedy

It having been found that Spruce Up violated Section 8(a)(1), (3), and (5) of the Act, and that Fowler violated Section 8(a)(5) and (1), it will be recommended that they be ordered to cease and desist therefrom and to take appropriate, affirmative action.

Since it appears that the unlawful, unilateral changes in pay rates effected by Spruce Up on October 29, 1969, involved in at least some instances reductions in pay, it will be recommended that Spruce Up be required to make whole any employees affected by such reductions by payment to them of the earnings lost by them as a result of such reductions during the term of their employment by Spruce Up, together with interest at 6 percent per annum, as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.³⁷

It having been found that Spruce Up discriminatorily discharged Brown and Womble on July 14, 1969, it will be recommended that it be ordered to reimburse them for all moneys lost as a result of such discrimination,³⁸ less their net interim earnings, together with interest as specified above.

It has been found that Spruce Up and Fowler also violated Section 8(a)(5) and (1) of the Act. Since Spruce Up is already subject to an outstanding order to bargain with the Union for the certified unit, no useful purpose would be served by issuing another order to that effect, particularly as Spruce Up is no longer the

³⁷ Since this backpay award applies only to the period of the barbers' employment by Spruce Up, and would not be subject to offset by earnings from other employers, there is no need to provide for computation of such backpay on a quarterly basis.

³⁸ As noted above, although both were rehired on September 9, 1969, the General Counsel contends that they were not restored to their former jobs as required by the Act. This matter may best be resolved in compliance proceedings.

employer of the employees in such unit. Accordingly, no such order will be recommended. However, it may not be similarly redundant to order Fowler to recognize and bargain with the Union, upon request, even though the prior order already runs against Fowler as a successor to Spruce Up, particularly since Fowler's violations of its duty to bargain included direct dealing with employees and unilateral conduct, which was not specifically embraced in the prior order. Accordingly, a new bargaining order against Fowler will be recommended.

As a remedy for Fowler's foregoing violations of his bargaining obligation, as a result of which those of the 58 claimants that were formerly employed by Spruce Up suffered loss of employment, it will be recommended that, to the extent he has not already done so, Fowler be ordered to offer such former Spruce Up employees immediate placement in the positions they formerly held with Spruce Up, or, if such positions no longer exist, in substantially equivalent positions, dismissing, if necessary, any persons hired on or after March 3, to fill such positions. This recommendation is in accord with the Board's action in *Chemrock Corporation*, *supra*, where, citing the likelihood that there would have been no loss of employment by the drivers in that case, if the respondent had fulfilled its bargaining obligation, the Board ordered reinstatement of the drivers with backpay.³⁹ Here, it is clear that, if Fowler had recognized the Union and honored his bargaining obligations, all the old Spruce Up employees would have reported for work on March 3,

³⁹ However, the fact that Fowler's bargaining obligation was limited to the certified unit precludes extending the instant remedy to the Roscoe and Fisher employees, as they were not in such unit, and their reinstatement would not be appropriate or necessary to achieve the Board's objective in cases like this, which is to restore the union to the bargaining position it would have enjoyed but for the employer's unfair labor practices. See *Fibreboard Paper Products Corp.*, 138 NLRB 550, enf. 379 U.S. 203; *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022.

and they might well have continued to work so long as their services were needed. For, the record shows that the refusal of the bulk of such employees to report for work on March 3, was prompted mainly, if not exclusively, by Fowler's refusal to bargain with the Union and his insistence on bypassing it and dealing directly with the barbers concerning their terms of employment.

Since it appears likely that there will not be sufficient jobs for all of the foregoing claimants and the remaining employees, it will be recommended that the Board require that, in such a case, all available jobs be distributed in accordance with such non-discriminatory practice as has been followed in the past in effecting layoffs, and that any employees for whom jobs are still available shall be placed on a preferential hiring list, their position on such list to be determined in accordance with such prior practice.

It will be further recommended that Fowler be ordered to make the foregoing former Spruce Up employees whole for any loss of earnings suffered by them as a result of Fowler's unlawful conduct in refusing to bargain with the Union about their new rates.⁴⁰ However, in computing the amount of backpay due them, it would be inappropriate to base such computation on the commission rates in effect immediately before the takeover by Fowler, since such rates were geared to a substantially lower schedule of prices for the barbers' services.⁴¹ To apply the same percentages to the higher schedule introduced by Fowler might well result in a considerable increase in take home pay. Such a result would be incompatible with the Board's objective in cases like this, which is solely to re-establish the conditions which existed before the incidence of the unfair labor practices. It would seem that

⁴⁰ *Chemrock Corporation, supra*, at pp. 1081-1082.

⁴¹ The record indicates that the price of haircuts was raised by Fowler on March 3, from 90 cents to \$1.00.

this problem can best be resolved by adopting for purposes of backpay computation whatever rate is negotiated between the Union and Fowler in their first contract or, if no agreement is reached, whatever rate is proposed by Fowler up to the point of good-faith impasse. It will be so recommended. Such backpay shall, moreover, be computed on a quarterly basis, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, with interest at 6 percent per annum.

A kindred problem is involved in fashioning a remedy for the unilateral reduction in commission rates paid by Fowler to those former Spruce Up employees and others who were hired after March 2 to fill unit jobs. It will be recommended that, in computing the backpay due for such reduction in rates, the Board adopt the same percentages as are determined to be applicable to the claimants in accordance with the procedure outlined above, and award the difference between the earnings actually received from Fowler and the amount that would have been received on the basis of such percentages over the same period of time.

V. Conclusions of Law

1. Spruce Up Corporation and Cicero Fowler t/a Fowler Barber Shops are employers engaged in commerce or operations affecting commerce within the meaning of the Act.

2. The Union has since August 4, 1969, been the exclusive representative of the following employees pursuant to Board certification:

All employees performing barbering services, including shop managers and co-managers, in the barber shops operated by Spruce Up Corporation at Fort Bragg, North Carolina, excluding office clerical employees, shoeshine employees, guards and supervisors as defined in the Act.

3. On October 22, 1969, Spruce Up violated Section 8(a)(5) and (1) of the Act by instituting unilateral changes in the pay rates of employees in the aforedescribed unit.

4. Spruce Up violated Section 8(a)(1) by interrogating employees about their Union activity, threatening reprisals for such activity, and offering inducements to abandon such activity.

5. Spruce Up violated Section 8(a)(3) and (1) of the Act by discharging Jesse Womble and David Brown on July 14, 1969.

6. On March 3, Fowler succeeded to the obligations of Spruce Up under the foregoing certification, and he has since that date violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the exclusive representative of his employees in the aforedescribed unit, by negotiating directly with individual employees in said unit concerning their terms of employment and by unilaterally changing their pre-existing rates of commission.

7. The foregoing are unfair labor practices affecting commerce within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is issued the following recommended:⁴²

⁴² In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER

A. Respondent, Spruce Up Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, and concerted activities on behalf of, Journeyman Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL-CIO, Local 844, or any other labor organization, by discharging employees or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Coercively interrogating employees about their union sentiments.

(c) Offering inducements to employees to reject the afore-named union or any other union.

(d) Threatening reduction in pay, more difficult working conditions or any other reprisals for union activity.

(e) Changing commission rates without consulting the statutory representative of its employees.

(f) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act.

(a) Make whole David Brown and Jesse Womble, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," for any loss

of pay they may have suffered by reason of the discrimination against them, and make whole in the same manner all employees who suffered a reduction in take home pay as a result of the changes in wages of October 22, 1969.

(b) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Mail forthwith to its former employees at Fort Bragg, North Carolina, copies of the notice attached hereto, marked "Appendix A,"⁴³ on forms to be provided by the Regional Director for Region 11, which shall have been duly signed by Spruce Up's representatives.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of receipt of this Order, what steps Spruce Up has taken to comply herewith.⁴⁴

B. Respondent, Cicero Fowler t/a Fowler's Barber Shops, Fort Bragg, North Carolina, his agents, successors, and assigns, shall:

1. Cease and desist from:

⁴³ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

⁴⁴ In the event that this recommended Order is adopted by the Board, after exceptions are filed, this provision shall be modified to read: "Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Spruce Up has taken to comply herewith."

(a) Refusing to bargain, upon request, with Journeyman Barbers, Hair Dressers, Cosmetologists and Proprietors, International Union of America, AFL-CIO, Local 844, as the representative of its employees in the following unit:

All employees performing barbering services, including shop managers and co-managers, in the barber shops formerly operated by Spruce Up Corporation at Fort Bragg, North Carolina, excluding office clerical employees, shoeshine employees, guards and supervisors as defined in the Act.

(b) Effecting changes in pre-existing pay rates without consulting the statutory representative of its employees.

(c) Negotiating directly with individual employees, while they have a statutory representative.

(d) In any like or related manner, interfering with, restraining, or coercing, his employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named Union as the exclusive representative of the employees in the unit defined above with respect to wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract.

(b) In the manner outlined in the "Remedy" section of the Trial Examiner's Decision, offer all those named in

"Appendix B" attached hereto immediate placement in the same positions they held as employees of Spruce Up, or if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(c) In the manner prescribed in said "Remedy" section, make whole the foregoing employees and all others in the above-described unit, for any loss of earnings suffered as a result of their concerted refusal to accept employment from Fowler on and after March 3.

(d) Immediately notify any of those entitled to an offer of employment under paragraph (c), above, who are personally serving in the Armed Forces of the United States, of their right to such employment, upon application, in accordance with the Selective Service Act and the Universal Military Training and Selective Service Act, as amended, after discharge from the Armed Forces.

(e) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(f) To the extent and in the manner prescribed in the "Remedy" section of the Trial Examiner's Decision, make its employees in the afore-described unit whole, for any earnings lost by them after their employment by Fowler as a result of the changes in pay rates affected on and after March 3, pursuant to the notice of February 27.

(g) Post at Fowler's barber shops at Fort Bragg, North Carolina, copies of the notice attached hereto, marked "Appendix B."⁴⁵ Copies of said notice, on forms to be

⁴⁵ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice read-

provided by the Regional Director for Region 11, shall, after being duly signed by Fowler's representative, be posted by him immediately upon receipt thereof, and maintained by him for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Fowler to insure that such notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 11, in writing, within 20 days from the date of receipt of this Order, what steps Fowler has taken to comply herewith.⁴⁶

IT IS FURTHER recommended that all allegations of the complaint which have not been sustained be dismissed.

Dated at Washington, D.C.

/s/ Sidney Sherman
SIDNEY SHERMAN
Trial Examiner

ing "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

⁴⁶ In the event that this recommended Order is adopted by the Board, after exceptions are filed, this provision shall be modified to read: "Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Fowler has taken to comply herewith."

APPENDIX "A"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection; and
- To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT change wages without consulting the union representing our employees.

WE WILL NOT discharge employees or otherwise discriminate against them, because of their interest in JOURNEYMAN BARBERS, HAIR DRESSERS, COSMETOLOGISTS AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA, AFL-CIO, LOCAL 844, or any other union.

WE WILL NOT threaten any reductions in pay, more difficult working conditions, or any other reprisals on account of your union activity.

WE WILL NOT ask you how you feel about a union.

WE WILL NOT offer you promotions or any other inducements to give up a union.

WE WILL make whole David Brown and Jesse Womble for any loss of earnings suffered by them as a result of their discharge on July 14, 1969, and we will reimburse our former employees for any loss of pay suffered as a result of the change in commission rates effected on October 22, 1969.

All our employees are free to belong, or not to belong, to JOURNEYMAN BARBERS, HAIR DRESSERS, COSMETOLOGISTS AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA, AFL-CIO, LOCAL 844.

SPRUCE UP CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101 (Tel. No. 919-723-9211 x 360).

APPENDIX "B"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection; and
- To refrain from any or all of these things.

I WILL NOT do anything that intereferes with these rights.

I WILL NOT effect changes in pay rates of employees in the unit described below without consulting their bargaining agent.

I WILL NOT negotiate directly with employees or prospective employees, while represented by a union, concerning their wages rates or other terms of employment.

I WILL bargain, upon request, with JOURNEYMAN BARBERS, HAIR DRESSERS, COSMETOLOGISTS AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA, AFL-CIO, LOCAL 844, as the exclusive representative of the employees in the unit described below with respect to wages, hours and all other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract. The unit is:

All employees performing barbering services, including shop managers and co-managers, in the barber shops formerly operated by Spruce Up Corporation at Fort Bragg, North Carolina, excluding office clerical employees, shoeshine employees, guards and supervisors as defined in the Act.

I WILL offer to hire the persons named below in their old jobs, and, if such jobs no longer exist, in substantially equivalent jobs:

Allen, Christopher, Jr.	Hooper, Thomas, Jr.
Bailey, Jimmie A.	Hudson, James
Ballew, David G.	Hunt, Hector
Bilbrey, Earl L.	Lee, Joseph M.
Brown, David C.	McCormick, George E.
Butler, Thaddeus L.	Pridgen, Willie C.
Cole, E. C.	Sinclair, Howard
Green, William Edward	Smith, James C.
Hall, Joe P.	Williams, Merriel B.
Hargrove, Eugene D.	Womble, Jesse E.

I WILL made whole the above-named employees and all others in the unit described above for any earnings lost by them as a result of their concerted refusal to work for me on and after March 3, 1970.

I WILL also make whole all employees in the unit described above for any earnings lost by them while in my employ as a result of changes in commission rates put into effect on and after March 3, 1970, without consulting their union.

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All our employees are free to belong, or not to belong, to JOURNEYMAN BARBERS, HAIR DRESSERS, COSMETOLOGISTS AND PROPRIETORS' INTERNATIONAL UNION OF AMERICA, AFL-CIO, LOCAL 844.

CICERO FOWLER
t/a FOWLER'S BARBER SHOPS
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101 (Tel. No. 919-723-9211 x 360).

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Source of the Board's construction of the *Burns* exception

209 NLRB 194 (1974)

D—6877

Fort Bragg, N.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 11-CA-3949-1

Case 11-CA-3949-2

Case 11-CA-3949-3

SPRUCE UP CORPORATION

and

DAVID BROWN, an Individual
HECTOR HUNT, an Individual
JESSE WOMBLE, an Individual

Case 11-CA-4198

CICERO FOWLER t/a FOWLER'S BARBER SHOPS

and

JOURNEYMAN BARBERS, HAIR DRESSERS, COSMETOLOGISTS
AND PROPRIETORS' INTERNATIONAL UNION OF
AMERICA, AFL-CIO, LOCAL 844

(SPRUCE UP II)

SUPPLEMENTAL DECISION AND ORDER

On January 5, 1972, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,¹ finding, *inter alia*, that Respondent Cicero Fowler engaged in certain conduct in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering him to cease and desist

¹ 134 NLRB 841.

therefrom and to take certain affirmative action, as set forth herein. Thereafter, the Board applied to the United States Court of Appeals for the Fourth Circuit for enforcement of its Order.

In the meantime, however, the United States Supreme Court issued its decision in *N.L.R.B. v. Burns International Security Services, Inc.*² On July 6, 1972,³ at the Board's request, the court of appeals remanded the instant cases to the Board for reconsideration in the light of *Burns*.

We have reconsidered our original findings in these cases in light of the *Burns* decision, and the record as a whole, and have determined that the principles enunciated by the Supreme Court in *Burns* require that we make certain modifications of those findings as set forth below.

For many years the barbering at Fort Bragg, North Carolina, has been handled by concessionaires selected periodically by the Fort's exchange service on the basis of competitive bids. From March 3, 1969, through March 2, 1970, Respondent Spruce Up Corporation operated 19 of the 27 barber shops at Fort Bragg; the remaining 8 shops were operated by 2 other concessionaires, Roscoe and Fisher. The Charging Party, Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL-CIO, Local 844 (hereinafter referred to as the Union), was certified in a unit of the 19 Spruce Up shops on August 4, 1969. In late 1969, the exchange service reopened the bidding for the operation of all of the barber shops at the Fort. In early 1970, Respondent Cicero Fowler was notified that he was the lowest bidder. On March 3, 1970, Fowler assumed operation of all the shops at Fort Bragg.

² 406 U.S. 272 (1972).

³ No. 72-1268 (unpublished).

On February 6, 1970,⁴ when the Union learned that Fowler was the lowest bidder and likely to take over the operation of the Spruce Up barber shops, it requested Fowler to recognize and bargain with it. Fowler refused, contending that he had no employees yet and in any event would have no duty to bargain before March 3. Fowler testified that at this meeting with the Union he told the union representatives, when asked what his intentions were about hiring barbers, that "all the barbers who are working will work." He also told the union representatives what he planned to pay the barbers. The Union renewed its request to bargain at another meeting with Fowler on February 26, but Fowler again refused, giving the same reasons.

On February 27, in anticipation of his takeover on March 3, Fowler distributed to the barbers of all 27 shops located at Fort Bragg individual form letters setting forth the rates of commission he intended to pay (which were different from those paid to the barbers by Spruce Up Corporation) and requesting that all those who desired to work for Fowler on that basis return the letter with their signature. On March 2, at a meeting called by the Union and attended by most of the barbers from all 27 shops, the men voted not to sign the form letter and to withhold their services and picket the base. The next day, a majority of the barbers failed to report to Fowler and picket lines were set up at the entrance to the post.

Eighteen of the former Spruce Up barbers crossed the picket line and reported to work for Fowler on March 3, on the basis of the new rates previously announced by him. The next day Fowler began hiring replacements for those failing to report and after 2 weeks the replacements outnumbered the former Spruce Up barbers. However, as time went by and the strike continued, more and more of the former Spruce Up barbers crossed the picket

⁴ Hereinafter, all dates refer to 1970 unless otherwise stated.

lines and reported to work until, by April 14, a majority of the barbers working for Fowler in the 19 former Spruce Up shops (32 out of 55) were barbers who had previously worked for Spruce Up, and such barbers remained in the majority thereafter. After March 3, on two separate occasions, April 3 and April 11, the Union met with Fowler and requested recognition, but Fowler refused and has continued to refuse to recognize and bargain with the Union.

By May 28, about half of the strikers had returned to work and on that date Fowler received a letter from those remaining on strike unconditionally offering to return to work. None of this latter group has been rehired nor does the record show that any other barber has been hired as of the date of the hearing.

In our original decision,⁵ we adopted the Administrative Law Judge's findings that Respondent Cicero Fowler violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union representing the former Spruce Up employees since February 26, 1970, by dealing directly with such employees on February 27, and by unilaterally changing commission rates of such employees on March 3, 1970. We ordered Fowler, *inter alia*, to reinstate and make whole, as of May 28, 1970, those former Spruce Up employees unconditionally offering to return to work on that date, having found them to be unfair labor practice strikers. We hereby modify those findings for the reasons set forth below.

In *Burns*, the Supreme Court enunciated the principle that, "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor" without first bargaining with the employees' bargaining representative. In the same paragraph, however, it recognized an exception to that principle in "instances in

⁵ 194 NLRB 841.

which it is perfectly clear that the new employer plans to retain all of the employees in the unit" ⁶ Without delineating at this time the precise parameters of that exception, we are constrained to find the instant facts do not fall within it.

Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer

⁶ The precise language of the Court was:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act, 29 U.S.C. Section 159(a). [406 U.S. 272 at 294-295.]

under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not “perfectly clear” to either the employer or to us that he can “plan to retain all of the employees in the unit” under such a set of facts.

We concede that the precise meaning and application of the Court’s caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to a least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,⁷ or at least to circumstances

⁷ See, for example, *Howard Johnson Company*, 198 NLRB No. 98, and *Good Foods Manufacturing & Processing Corporation, Chicago Lamb Packers, Inc.—Division*, 200 NLRB No. 86, where the successor-employers, without prior warning, unilaterally changed the terms and conditions of employment prevailing under the predecessor after already having committed themselves to hire almost all of

where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

For these reasons, we find that Fowler’s expressions to the old employees were not within the Court’s caveat, and we conclude that those expressions did not operate to forfeit his right to set initial terms. Accordingly, we find no violation of the Act in his having done so.⁸

However, as in *Burns*, we find that Respondent did, subsequently, employ a majority of the former Spruce Up barbers in his work complement in the certified unit, at least by April 14. By that date Fowler had in fact hired 32 out of 55 such former employees in the certified unit. Thus, from that date, the Union had, at the least, a presumption of continuing majority status which Respondent failed to overcome. Respondent was therefore obligated to recognize and bargain with it.

Member Kennedy, in dissent, expresses the view that there was a substantial change in the unit arising out of the fact that Spruce Up had operated 19 barber shops at Fort Bragg whereas Fowler contracted to operate all 27 shops located at the Fort. Member Fanning, in his separate opinion, has stated the view, subscribed to by Member Penello in his dissent, that the addition of these eight shops did not destroy the appropriateness of the certified bargaining unit and constituted only “an expansion of the bargaining unit.” We agree, essentially, with the view of Members Fanning and Penello. This

the old unit employees with no notice that they would be expected to work under new and different terms. In those cases we found a violation of the respondents’ bargaining obligation.

⁸ As noted in the concurring part of his separate opinion, Member Kennedy joins Chairman Miller and Member Jenkins in the foregoing interpretation of the pertinent *Burns* language and the application of that interpretation to the facts here.

addition of a few more shops does not destroy the basic continuity of the employing industry, which is the key-stone of our successorship doctrine. We here speak of what the Supreme Court in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551, refers to as "a substantial continuity of identity in the business enterprise." There can be no doubt that, had the predecessor acquired the contract to operate these eight additional shops, we would have treated the addition of these like facilities and similarly classified employees as an accretion to the certified unit. It seems reasonable to apply the same doctrine to the successor.

Had there been a substantial alteration in the basic character of the unit, as in *Atlantic Technical Services Corporation*⁹ (from a 14,000-plus multilocation unit to only a single mailroom employing 41 employees), the situation would be quite different and, as we held there, there would then be no successorship at all in any event. That is an entirely different situation from the one presented here, where the only addition to the unit would, had it been added by the predecessor, clearly have been an accretion.

Member Kennedy is of the further view that the majority must be measured in the "new" unit consisting of the 19 Spruce Up shops plus the 8 additional shops on the base which Fowler contracted to operate. Members Fanning and Penello, on the other hand, are of the view that only "a legally significant portion of the successor's employment force" must consist of employees previously employed by the predecessor.

We believe the position of Members Fanning and Penello to be at odds with the clear import of the Supreme Court's decision in *Burns* which has recently been reiterated by a unanimous Court in *Golden State Bottling*

⁹ 202 NLRB No. 13, cited in Member Kennedy's dissent.

Co. v. N.L.R.B., — U.S. —, 42 U.S.L.W. 4039, where the Court said in footnote 6:

. . . the purchaser, if it does not hire any or a majority of those employees, will not be bound . . . by any order tied to the continuance of the bargaining agent in the unit involved.

But we also believe Member Kennedy to be in error with respect to the unit in which the majority must, under *Burns*, be tested. As we have pointed out *supra*, had the predecessor acquired the additional eight shops, there can be no doubt that this Board would have treated such an addition of like facilities and similarly classified employees as an accretion to the extant unit, and such an accretion would have given the predecessor no right to question the continuing majority status of the Union. Neither, then, do we understand why the successor to the bargaining obligation should be permitted to do so, if it becomes clear on the record evidence that his hires from the predecessor's work force meet the test announced by the Supreme Court—i.e., that the majority status of the Union in the preexisting unit has been reestablished. At the least, we would find that at such time as the hiring engaged in by the successor results in a reestablishment of a majority in the preexisting unit there arises a presumption of continuing majority status. If, after that point has been reached, new facts and circumstances arise which under our usual tests would provide the Employer with objective evidence casting doubt on the continuance of the majority status, he might be justified in putting the Union to the test of demonstrating its majority through a Board election or otherwise.

But, as pointed out by Member Fanning in his dissent at footnote 34, Fowler does not appear to have asserted any such defense herein. To the extent that we have any evidence with respect to the effect on majority status of the added 8 shops it tends to reaffirm, rather than to

negate, the presumption which we are here applying. Thus, barbers employed in the former Roscoe and Fisher shops attended and participated in the union meeting of March 2, and some barbers joined the Spruce Up barbers in picketing the Fort and were included in the Union's "return to work" offer of May 28. Under all of these circumstances we see no reason not to rely on the presumption of continuing majority status, and we find that, on and after April 14, the Union represented a majority of Fowler's work force and he was thereupon obligated to recognize and bargain with it.

Although the record does not reflect that the Union expressly requested Fowler to bargain after April 14, the Board has long held that a union is not obligated to repeatedly renew its request to bargain when it would be futile to do so, particularly when the circumstances of previous requests are such as to put the employer on notice that the union is desirous of representing the employees and where no intervening disclaimer of that interest has been made or can reasonably be inferred from the union's conduct. As noted above, here the Union has requested recognition only 3 days earlier, on April 11, and gave every indication, by its continued picketing, that it was still claiming to represent the employees in the certified unit on and after April 14. Accordingly, we find that the Union's request to bargain on April 11 was of the nature of a continuing request, and should reasonably have been understood by Fowler to be such.

We turn now to yet another knotty problem—i.e., the status of the persons formerly employed by Spruce Up who withheld their services from Fowler, and who made an unconditional offer to accept employment with Fowler on May 28. They are referred to by the Administrative Law Judge as "claimants." The Administrative Law Judge rejected General Counsel's contention that all former Spruce Up employees were discriminatorily denied

employment, and we agree. He also held that the 24 "claimants" could not be treated as unfair labor practice strikers because they had never become employees of Fowler. In support of this finding, he cited *Joliet Contractors Association*, 99 NLRB 1391, aff'd. 202 F.2d 606 (C.A. 7), in which we held that a concerted withholding of services from a prospective employer was not a strike. We agree that his holding in this regard is consistent with our precedent.

—He then went on to find, however, that Respondent's unlawful direct dealing with employees, unilateral conduct, and refusals to bargain caused the loss of employment of the "claimants," and, as a remedy for these violations, he ordered reinstatement and backpay and directed that any persons hired after March 3 be displaced, if necessary, in order to permit the full effectuation of his order. As authority for applying this remedy, he cited *Chemrock Corporation*, 151 NLRB 1074. The rationale there, and the Administrative Law Judge's rationale here, is to the effect that the loss of employment was caused by respondent's failure to fulfill its bargaining obligation.

The Administrative Law Judge found a violation of Respondent's bargaining obligation to have commenced on March 3, and that Respondent on that date violated the Act by unilaterally changing wages and improperly dealing with individuals. We have rejected those findings as being precluded by our understanding of the principles of *Burns*, but we have found a violation of Respondent's bargaining obligations to have commenced on April 14—also based on our understanding of the principles of *Burns*.

But we must now determine whether Respondent's unlawful refusal to bargain on and after April 14 may fairly be said to have caused a loss of employment by the "claimants." If so a reinstatement and backpay order is

appropriate to restore the status quo but if not, such a remedy would not be warranted.

This is a much more difficult question to answer in the present posture of this case than it was in the pre-*Burns* posture in which the Administrative Law Judge below decided it. For we have now held that the Respondent properly offered employment to the former Spruce Up employees at terms unilaterally set by him. And it is quite clear from the record that any of the claimants could have had employment at all times relevant hereto, had they seen fit to go to work on those terms. But to what extent were the claimants deterred from seeking such employment by the lawful new terms, and to what extent were they deterred by Respondent's refusal to recognize the Union—a refusal which, under *Burns*, was lawful prior to April 14 but unlawful thereafter?

We believe we are entitled to resolve the doubts against the wrongdoer, with due respect to the requirements of supporting record evidence. We cannot say with absolute certainty how many of the claimants would have accepted employment with Fowler on April 14 had he consented to recognize the Union and commence bargaining on that date. It seems reasonable to us that they might have. Even though they would have had to accept new terms which they obviously found undesirable, they would at least then have had an opportunity to seek to better those terms through the collective bargaining to which they were lawfully entitled. It is clear that they cherished that right to representation, and that Respondent's refusal to grant it was a significant motivating factor in their unwillingness to accept employment.

But we are unwilling to rely solely on inferences on the basis of our expertise so to find. Instead, we turn to the record evidence, which shows that all doubts as to this were removed by the events of May 28, 1970,

when, through their Union, the claimants offered unconditionally to accept employment. This constitutes clear and unrefuted evidence that as of that date the claimants were not motivated by the unacceptability of Respondent's terms, and it is clear that from that date forward the claimants were entitled to any available jobs on a preferential basis, and any continuing loss of employment thereafter was, demonstrably, a result of Respondent's unlawful continuing refusal to recognize their bargaining agent.

Accordingly we find that from and after May 28 any and all former employees of Spruce Up suffered a loss in employment as a direct result of Respondent's continuing unlawful refusal to bargain with their chosen representative. And we shall therefore order reinstatement and backpay commencing on that date. Fowler will be ordered to offer such former Spruce Up employees immediate placement in the positions they formerly held with Spruce Up, or, if such positions no longer exist, in substantially equivalent positions, dismissing, if necessary, any persons hired on or after May 28 to fill such positions.

Since it appears likely that there will not be sufficient jobs for all of the foregoing claimants and the remaining employees, we shall require that all available jobs be distributed in accordance with such nondiscriminatory practice as has been followed in the past in effecting layoffs, and that any employees for whom jobs are still unavailable shall be placed on a preferential hiring list, their position on such list to be determined in accordance with such prior practice.

The Remedy

Having found that Fowler violated Section 8(a) (5) and (1) of the Act in refusing to recognize and bargain

with the Union after April 14, we shall order Fowler to recognize and bargain with the Union upon request.

Having found the former Spruce Up employees who were not employed by Respondent after May 28 suffered a loss of employment because of Respondent's unlawful refusal to bargain, we shall order Fowler to offer these employees reinstatement to their former positions, or, if those positions are no longer available, to substantially equivalent positions, dismissing, if necessary, any persons hired after May 28. If there are still not sufficient positions to reinstate all the employees, we shall order Fowler to place those remaining on a preferential hiring list. We shall also order Fowler to make whole those employees entitled to reinstatement for any earnings they may have lost during the period commencing May 28, 1970, to the date that he offers them reinstatement.¹⁰

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Spruce Up Corporation and Cicero Fowler t/a Fowler's Barber Shops, Fort Bragg, North Carolina, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph B 1(b), (c), and (d).

¹⁰ As noted in their separate opinions, Members Fanning and Penello would find that the refusal to bargain occurred at earlier times than is found by Chairman Miller and Member Jenkins, a circumstance which would enlarge the reinstatement and backpay rights of the striking unit employees beyond that afforded by this order. Their view, however, does not command a majority. Accordingly, they join in the order providing the remedial relief set forth above.

2. Substitute the following for paragraph B 2(b) and (c):

"(b) In the manner outlined in the Remedy section of the Board's Supplemental Decision, offer all those named in the attached notice marked "Appendix B" reinstatement, without prejudice to their seniority or other rights and privileges.

"(c) In the manner detailed in the Remedy section of the Board's Supplemental Decision, make whole the foregoing employees for any loss of earnings suffered from Fowler's failure to offer them reinstatement on and after May 28, 1970."

3. Delete paragraph B 2(f) and reletter the succeeding paragraphs accordingly.

4. Substitute the attached notice for the Administrative Law Judge's Appendix B.

Dated, Washington, D.C., Sep. 23, 1974.

/s/ Edward B. Miller
EDWARD B. MILLER, Chairman

/s/ Howard Jenkins, Jr.
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER KENNEDY, concurring in part and dissenting in part:

I agree with Chairman Miller and Member Jenkins (hereinafter referred to as the majority) that the Supreme Court's decision in *Burns* requires us to vacate our earlier decision in which we found that Respondent Fowler violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on February 26, 1970, by dealing directly with the former Spruce Up employees on February 27, 1970, and by unilaterally changing commission rates of such employees on March 3, 1970.¹¹ I do not agree with the majority that Fowler violated Section 8(a)(1) and (5) of the Act when he failed to bargain with the Union on and after April 14, 1970. In my view, there is no evidence in this record to support a finding that Fowler committed any unfair labor practices. Accordingly, the make-whole and reinstatement order of the majority is without legal support.

The majority properly relies on *Burns* to find that Fowler lawfully set the terms and conditions of employment of his employees without bargaining with the Union. In finding an unlawful refusal to bargain on April 14, however, they ignore the crucial observation

¹¹ I disagree with the conclusion of Members Fanning and Penello that Fowler forfeited his right under *Burns* "to set initial terms on which it will hire the employees of a predecessor" because he expressed a general willingness to hire all barbers then working for Spruce Up who were willing to accept his commission rates which were different from those of Spruce Up. Surely, the Supreme Court did not mean that a general expression of willingness to hire the old employees on his terms defeated the very right of the new employer to set terms and conditions of employment. Fowler made clear to the union representatives on February 6 and to the Spruce Up barbers employed on February 27, 1970, that he would continue with the old work force *only* if they accepted the new commission rates which he proposed to them. The *Howard Johnson* case involved unilateral changes *after* the employees were hired.

of the Supreme Court in *Burns* that the bargaining obligation passed to the new employer in that case because the bargaining unit remained unchanged. The record herein establishes that there was indeed a substantial change in the bargaining unit. Furthermore, there is no proof that the Union was supported by a majority of employees in an appropriate unit of Fowler's employees, and the Union never requested Fowler to bargain on April 14, or thereafter, the date on which the majority finds that Fowler refused to bargain.

There Was a Substantial Change in the Unit for Bargaining

It is clear that approximately one-half of the Spruce Up barbers have never been employed by Fowler. As found by the Administrative Law Judge, most of the barbers formerly employed by Spruce Up met on March 2, 1970, and voted not to accept Fowler's terms of employment. They voted "to withhold their services and picket the base." The picketing continued until May 27 when "about half of these barbers had returned to work, and on that date the rest offered to return but none of the latter group has been hired." If the Board majority is correct in construing *Burns* to teach that Fowler lawfully set terms and conditions of employment when he commenced operations, it necessarily follows that Fowler was not obliged to discharge his non-Spruce Up barbers on May 28 to make room for those Spruce Up barbers who then indicated their willingness to accept Fowler's terms. Since it is clear that "about half" of the Spruce Up barbers have not been hired by Fowler, it cannot be said that there has been sufficient continuity of employment to make Fowler a successor to Spruce Up. It is inaccurate to suggest that Fowler has continued with basically the same work force.

The majority opinion correctly points out that prior to March 3, 1970, Spruce Up operated 19 of the 27 barber

shops at Fort Bragg. The eight other barber shops at the Fort had been operated by two other concessionaires; namely, Roscoe and Fisher. The Union had not been recognized or certified at any of these eight shops. On March 3, 1970, Fowler commenced operations of all 27 shops at Fort Bragg.

We have recently had occasion to examine the principles governing cases where the transfer of a business from one employer to another has resulted in a substantial change in the scope of the unit. In *Atlantic Technical Services Corporation*,¹² Trans World Airlines had performed mail and distribution support services at the Kennedy Space Center under a contract with NASA. After obtaining the contract, TWA voluntarily agreed to extend its basic companywide collective-bargaining agreement, which covered some 14,000 employees, to the 41 employees performing mail and distribution functions. Thereafter, the Respondent Atlantic Technical Services Corporation obtained the contract to perform the mail and distribution functions formerly performed by TWA and hired 27 of the 41 employees then performing these duties. The Respondent ATSC thereafter refused to bargain with the Union asserting, *inter alia*, that the unit requested was inappropriate and that it doubted the Union's majority status. We found that the Respondent ATSC was not a successor-employer to TWA relying, in part, on the fact that "the diminution in the scope of the unit . . . is a relevant factor to be considered, among others, in determining whether or not a new employer is a successor." Accordingly, we found that Respondent ATSC was not bound by TWA's obligation to bargain with the union on the successorship theory.

In the case before us we have, not a diminution of the former bargaining unit, but a substantial expansion

¹² 202 NLRB No. 13.

of the unit from the 19 shops operated by Spruce Up to the 27 shops operated by Respondent Fowler.¹³ The applicable principles remain the same. The crucial question is whether the transfer of the business from one employer to another has brought a substantial change in the unit.

In my view, all of my colleagues fail to give sufficient weight to the fact that Fowler took over operation of all the shops at Fort Bragg and not just those previously operated by Spruce Up. If we were called upon to decide in a representation case the appropriate unit among Fowler's employees, Board standards would not permit us to find a separate unit limited to the 19 shops previously operated by Spruce Up. Our precedent would dictate that the Board find that either all 27 shops constitute an appropriate unit, or that each individual shop constitutes an appropriate unit. It has long been recognized that the Board has wide discretion in establishing the permissible limits of bargaining units, but I think it would be an abuse of discretion to establish a unit comprised of Fowler's employees in the 19 shops operated formerly by Spruce Up. For the same reason we cannot establish in this unfair labor practice proceeding a unit limited to the 19 shops formerly operated by Spruce Up. Manifestly, the change in the scope of the unit and the substantial differences in the employee complement do not require Fowler to honor the Spruce Up certification.

¹³ The majority's characterization of the eight additional shops of Roscoe and Fisher as an accretion to the certified unit of Fowler is tantamount to recognition that there has been a substantial change in the bargaining unit. Similarly, the characterization of Members Fanning and Penello that the "additional shops simply amount to an expansion of the bargaining unit" is tantamount to recognition by them that there has been a substantial change in the bargaining unit.

There Is No Proof That a Majority of
Fowler's Employees Were Represented by the Union

There is no basis on this record for finding that the Union represented a majority of employees of Fowler in an appropriate bargaining unit. If the substitution of Fowler to operate the 27 shops formerly operated by 3 concessionaires had involved no substantial change in the scope of the unit and if the substitution had involved no substantial change in the employee complement, it could be argued that the Board certification covering Spruce Up's employees was binding upon Fowler. As noted earlier, I believe that any such argument must be rejected on the facts disclosed by this record. This is particularly true in view of the fact that it was a decision of the Defense Department (and not Respondent) to consolidate operation of all barber shops under a single concessionaire. Similarly, it was the rejection of terms which Fowler set lawfully that resulted in the substantial change in the employee complement. We would be presented with a different legal problem if the changes in the employee complement in this case had resulted from improper or unlawful conduct by Fowler.

In my opinion, any inquiry as to whether the Union enjoyed majority support among Fowler's employees must be directed at the employment complement in all 27 shops operated by Fowler and not just the 19 shops previously operated by Spruce Up. The record establishes that on March 2, 1970, the day preceding Fowler's takeover of the 27 shops, there were 13 barbers employed in the Fisher shops, 10 barbers employed in the Roscoe shops, and 60 barbers employed in the Spruce Up shops. It makes a substantial difference whether the inquiry is directed to a majority of 83 employees or only 60. In this connection, we cannot overlook the fact that some of the barbers who formerly worked in Spruce Up shops returned to work for Fowler in shops previously oper-

ated by concessionaires Roscoe and Fisher. Furthermore, some of the former Spruce Up barbers initially returned to work in Fisher shops and thereafter transferred at a later date to one of the shops which had been previously operated by Spruce Up.¹⁴

Members Fanning and Penello state in their dissents that "successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit." Chairman Miller and Member Jenkins are clearly correct in stating that such a view is contrary to decisions of the Supreme Court in both *Burns, supra*, and *Golden State Bottling Co., supra*. Such a view also represents a sharp departure from longstanding Board precedent. This Board has consistently refused to find successorship and a duty to bargain where a majority of the new employer's work force was not composed of the employees of the old employer. Professor Stephen Goldberg points out in "The Labor Law Obligations of a Successor Employer," 63 Nw. U.L. Rev. 735, that he could find only two cases over a 20-year period in which the Board imposed a duty to bargain when there was no such majority; namely, *Firchau Logging Company, Inc.*, 126 NLRB 1215 (1960),¹⁵ and *John Stepp's Friendly Ford, Inc.*, 141 NLRB 1065, enforcement denied 338 F.2d 833, 836 (C.A. 9, 1964). The decision of the Court of Appeals for the Ninth Circuit reversing the *Stepp's* case has been cited with approval by the Board.¹⁶ The court stated:

¹⁴ This is further evidence that a unit limited to former Spruce Up shops ceased to be appropriate under Fowler's operation.

¹⁵ Apparently the *Firchau Logging Company, Inc.*, case was not the subject of judicial review.

¹⁶ *Federal Electric Corporation*, 167 NLRB 469; *Tallakson Ford, Inc.*, 171 NLRB 503.

The problem we face is that which arises when we have both a new owner and a substantial change in the personnel of the employee unit. While other courts have wrestled with this problem the situations before them have been confused by the fact that in most cases either the change in ownership or the change in the employee personnel has been brought about under circumstances suggesting a lack-of good faith and an attempt, on the part of the employer, to avoid the effect of the certification. Here there is no such suggestion.

The controlling question here, it would seem to us, is whether the new owner may rationally be said in substance, as to the unit in question, to have taken over and succeeded to his predecessor's employees. If he has not—if, on the contrary, he has within the unit in question secured his own employees—then he is not, as to the employees in question, a successor. He is their original employer. In such case both the employer and the employee unit are strangers to the certification and to the election upon which it was based. Nothing remains of the relationship to which the certification [is] attached. Under such circumstances, in our judgment, the certification cannot stand.

In the case before us it cannot rationally be said that the company has taken over and succeeded to Westward's salesman unit. Out of the twelve Westward salesmen only three, after interviews, were employed. It is clear from the record that they were not employed because of their Westward connection but because Stepp thought that they were the best he could get to fill out his sales force. Furthermore, half of the new employee unit consisted of men who already were Stepp employees. Even assuming that a Westward employment status continued to attach to the three Westward salesmen, still the character

of the new unit clearly was more Stepp than Westward. [Footnotes omitted.]

The Fifth Circuit has also quoted with approval from the Ninth Circuit's decision in the *Stepp's Friendly Ford* case. See *N.L.R.B. v. United Industrial Workers of the Seafarers International Union of North America, etc.* [*Port Richmond Elevator*], 422 F.2d 59 (C.A. 5, 1970).

We have said that in determining whether the "employing industry" remains substantially the same we inquire, *inter alia*, as to whether the new employer "has the same or substantially the same workforce."¹⁷ See *Georgetown Stainless Mfg. Corp.*, 198 NLRB No. 41. Can it be said that the new employer "has the same or substantially the same workforce" if he hires less than a majority of the old employer's employees? I think not. Indeed, it has been pointed out that "The cases involving the presumption of full majority status for a certified union are primarily instances where the purchasing enterprise has retained all or most of the old employees." See the concurring opinion of Judge Leventhal in *International Association of Machinists, District Lodge 94, AFL-CIO, et al. v. N.L.R.B.*, 414 F.2d 1135 (C.A.D.C., 1969). In this connection, I think the Sixth Circuit Court of Appeals was clearly correct in *N.L.R.B. v. Wayne*

¹⁷ In his speech to the Labor Law Section of the Texas Bar Association on July 7, 1967, Member Fanning correctly stated that the Board has:

... relied upon a set of criteria to determine whether the "employing industry" remains substantially the same. The questions asked by the Board are: (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) *whether he has the same or substantially the same work force*; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services. [Emphasis supplied.]

Convalescent Center, Inc., 465 F.2d 1039 (C.A. 6, 1972), that the "single factor" relied on to find successor status in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), was that 80 percent of the predecessor's employees had been hired by the new employer.

I disagree with the view of Members Fanning and Penello that all that is required for successorship is that a "legally significant portion of the successor's employment force must consist of employees previously employed in the bargaining unit."

I also disagree with the view of the majority (Chairman Miller and Member Jenkins) that the eight Roscoe and Fisher shops are an accretion to the old unit but the test of majority should be measured in the "pre-existing unit." Contrary to the suggestion of the majority, *Burns* does not support such a test because the *Burns* decision is predicated upon the stated premise that the "bargaining unit remains unchanged." Notwithstanding the fact that the unit in *Burns* remained unchanged, four of the Justices (Burger, Rehnquist, Brennan, and Powell) declined to find successorship. They reasoned that Burns' hiring a majority of Wackenhut employees did not establish that the union represented a majority of Burns' employees. They stated (406 U.S. at 297):

First, it is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had

ever expressed their views one way or the other about the union as a bargaining representative. It may be that, if asked, all would have designated the union. But they were never asked. Instead, the trial examiner concluded that because Burns was a "successor" employer to Wackenhut, it was obligated by that fact alone to bargain with the union.

The dissenters in *Burns* concluded that the imposition of the bargaining obligation under the circumstances of that case (27 of Burns' 42 employees had worked for Wackenhut) "sacrificed needlessly" the "important rights of both the employee and employer." But the imposition of a bargaining duty here in the expanded unit the moment (April 14, 1970) a majority of old employees were hired from the preexisting unit constitutes an unreasonable extension, I believe, of the majority opinion of the Supreme Court in the *Burns* case.

Our statute guarantees employees the right to choose their bargaining representative. There is nothing in the statutory language empowering this Board to impose upon all of Fowler's employees in the 27 shops a bargaining agent the moment the old employees from Spruce Up constituted a bare majority in the 19 shops previously operated by Spruce Up. There is a fundamental fallacy in our doing that for it is based on the unsupported assumption that every former Spruce Up employee who went to work for Fowler was a union supporter. We do not know how any of the old employees hired by Fowler voted in the Spruce Up election.¹⁸ If, however, a single one of those old employees voted against the Union the basis for

¹⁸ We cannot be certain as to how the 18 former Spruce Up barbers voted in the earlier election. Logic dictates, however, that the 18 Spruce Up barbers who reported to work for Fowler on March 3 included the bulk of the 13 barbers who voted against the Union in the Board election. See *Spruce Up Corporation*, 181 NLRB 721, which reflects that 63 ballots were cast in the election among the barbers in the 19 shops then operated by Spruce Up.

presuming "continued majority status" disappears because we do not know the view of any of the new employees. There is no evidence whatever that the new employees of Fowler in either the 19 shops or the 27 shops "had ever expressed their views one way or the other about the Union as a bargaining representative." As in *Burns*, "they were never asked."¹⁹ In my view, we "sacrifice needlessly" the statutory rights of all the new employees of Fowler by imposing a bargaining duty on Fowler.

Assuming, *arguendo*, that Chairman Miller and Member Jenkins are correct in their view that majority status must, under *Burns*, be tested in the "pre-existing unit" of 19 shops, it is unrealistic to presume that every former employee of Spruce Up hired by Fowler wanted the Union as his bargaining agent while employed by either Spruce Up or Fowler. As noted above, we do not know how any of the old employees voted in the Spruce Up election. We do know that 18 of those 32 former employees of Spruce Up ignored the Union's picket line to report to work on March 3, 1970, when Fowler commenced operations. Indeed, on April 14, all 32 of the barbers who had formerly worked for Spruce Up (as well as the remaining 23 barbers who were then working in the 19 former Spruce Up shops) were crossing the Union's picket line to work for Fowler.

In my view, we cannot presume majority support for the Union in the 19 shop unit (or the 27 shop unit) when every employee of Fowler had to cross daily the Union's picket line to report to work. Under such circumstances, we cannot presume that the percentage of Fowler employees supporting the Union was the same

¹⁹ Contrary to the suggestion of my colleagues, proof of majority status was the burden of the General Counsel. Fowler had no duty to assert a defense until the General Counsel offered satisfactory proof of majority. The Spruce Up certification does not satisfy that burden.

as the percentage of employees who had voted for the Union in the election conducted among Spruce Up's employees. My colleagues err, I think, in presuming that the Union here had majority support on April 14 simply because the Board correctly has presumed in other cases where substantially all of the former employees had been hired by a new owner that the ratio of union supporters to nonunion employees remained the same. Where the proportion of Spruce Up's employees is a bare majority in the 19 shop unit, there is no reason to assume that a majority favors union representation in the 27 shop unit.

There is insufficient evidence to support a finding or an inference that the majority of Fowler's employees wanted the Union to act as their bargaining representative on April 14.

The Absence of a Valid Request To Bargain

The majority finds that Respondent unlawfully refused to bargain after April 14, 1970, "although the record does not reflect that the Union expressly requested Fowler to bargain" after that date. There is no claim that Fowler made any unilateral changes on April 14 or thereafter. Apparently, the majority is holding that once Fowler had hired what they believe to be a majority of his employees from the pool of former Spruce Up employees, it was incumbent upon Fowler to seek out the Union and volunteer to bargain with it. Fowler's failure to volunteer to bargain is held to be an unlawful refusal to bargain.

The majority reasons that it was unnecessary for the Union to request bargaining after April 14 because the earlier requests made by the Union at a time when Fowler had not even hired a majority of his barbers in the former 19 Spruce Up shops was a "continuing request." The majority concludes that it would have been

"futile" for the Union to have again requested bargaining and the Union was therefore relieved of this essential requirement to a finding of an 8(a)(5) violation of the Act.

I fail to understand why it would have been "futile" for the Union to have again requested bargaining if it had obtained its alleged majority in the 19 shop unit. On the occasions the Union had made requests for bargaining prior to April 14, it did not represent a majority of the employees. Fowler's refusal to recognize the Union on those occasions was required by the Act. Otherwise, Fowler would have dealt with a minority union in violation of Section 8(a)(2) of the Act. While the picketing may have demonstrated the Union's continuing interest in representing the employees, it cannot be regarded, in my opinion, as evidence that Fowler would not bargain if requested to do so. In sum, I find the factors relied on by my colleagues to show that a request for bargaining would have been futile to be wholly unconvincing.

There are positive reasons for believing that a request for bargaining would not have been futile. At the time of the last request for bargaining on April 11, Fowler told the Union that he "couldn't say anything unless [his] attorney was there." This was not only a lawful response but also indicated that Fowler intended to abide by his legal obligations. More importantly, there is no finding that Fowler committed independent violations of the Act either before or after April 14, and there is no claim that Fowler made any unilateral changes in terms or conditions of employment after April 14. There is no reason for the Board to assume that a request for bargaining would have been rejected by Fowler because of a fundamental opposition to the purposes of the Act or because his earlier refusal to recognize a minority union stemmed from a desire to gain time to dissipate the Union's support among the employees. On the contrary,

his continued hiring of former Spruce Up employees clearly evinces a lack of hostility towards the rights of employees under the Act.

I therefore cannot subscribe to the finding of my colleagues that a request for bargaining by the Union on and after April 14 would have been an exercise in futility. My colleagues are here placing the burden on the Respondent to determine if and when a union represented a lawful majority of his employees and further requires him to then seek out the union and offer to bargain. In my opinion the statute imposes no such burden. Accordingly, I would not find that the Respondent violated Section 8(a)(5) of the Act on and after April 14.

Conclusion

This case was tried on the theory that Respondent Fowler violated Section 8(a)(5) of the Act when it changed the commission rates of the former Spruce Up employees without bargaining with the Union. In the original decision I joined my colleagues in finding the alleged violation on that theory. Our earlier decision rests on a major premise rejected in *Burns*. I think we are obliged to acknowledge that our earlier finding that Fowler is a successor is erroneous. The duty to bargain could arise only if the record established the majority status of the Union in an appropriate unit of Fowler's employees, a request by the Union to bargain in that unit, and a refusal by Fowler to bargain in response to such request. Since there is insufficient evidence in the record with respect to majority in an appropriate unit, no proof of a request to bargain, and no proof of a refusal, there is no basis for finding a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. Since I do not find that Respondent refused to bargain unlawfully, I disagree with the make-whole and reinstatement order provisions which are predicated upon the erroneous

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premise that Fowler was obliged to dismiss any barber hired after May 28 when the 20 Spruce Up barbers "made an unconditional offer to accept employment with Fowler."

The Supreme Court's decision in *Burns* requires dismissal of the complaint in its entirety.

Dated, Washington, D.C., Feb. 22, 1974.

/s/ Ralph E. Kennedy
RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

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MEMBER FANNING, dissenting in part and concurring in part:

Having reconsidered the issues in this case in the light of the Supreme Court's decision in the *Burns* case,²⁰ I reaffirm the findings and conclusions set forth in the Board's original decision herein, except as modified herein.

The facts in this case are fairly straightforward and not subject to substantial dispute. As noted by the majority, for many years the barber shops at Fort Bragg have been operated by concessionaires selected through periodic competitive bidding. From about March 1969 through March 1970, 19 of the shops were operated by Respondent Spruce Up. Eight other shops were operated by two other concessionaires, Roscoe and Fisher. In early 1970 Cicero Fowler, a barber on the base, submitted the low bid for the operation of all 27 shops. Respondent Cicero Fowler, t/a Fowler Barber Shops, commenced operation of the shops on March 3, 1970.

Prior to that date, the Union had been certified by the Board as the exclusive representative of Respondent Spruce Up's employees. As a result of unfair labor practices committed by Spruce Up, the Union's certification had not resulted in any collective bargaining at the time Fowler took over operation of the shops.

As is clear from the record, Fowler took over the operations with knowledge of the Union's representative status. Not only does the record reveal that he had been employed as a barber on the base since 1939, but he conceded on the record that, "I knew that they had a union out there. . . ." ²¹ Moreover, on February 6, when

²⁰ *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272.

²¹ Fowler's son, Charles, and brother, Edgar, had been employed in the Spruce Up bargaining unit; both reported to work for Fowler on March 3. Charles Fowler assists his father in the management of the business and was present with his father at the February 6 meeting, discussed *infra*, between Fowler and the Union.

it became apparent that Fowler had submitted the low bid, the Union went to Fowler and asked him whether he intended to hire the barbers who were then working in the shops. Fowler responded affirmatively, "All the barbers who are working will work."²² However, he indicated that he intended to change the commission by which their wages were determined. The Union then requested recognition as the barbers' bargaining representative and demanded bargaining about the contemplated changes. Fowler refused on the ground that the barbers were not yet his employees and he had no legal obligation to bargain until he took over the operations. On February 26, the Union renewed its request for bargaining. Fowler again refused, reiterating that there was no "employment contract" at that moment, and therefore nothing to bargain about. The Union advised Fowler that all the barbers desired to continue working at the base, but that it could not tell how many would report to work if Fowler continued his refusal to negotiate.

On February 27, Fowler had his son Charles deliver a letter to each of the barbers working in the shops which Fowler was to take over on March 3, setting forth the commission rates he intended to pay (these were different from the rates in effect during Spruce Up's operation) and extending to the barbers "the opportunity to work for me under the above mentioned terms. If you are willing to work for me please sign at the bottom of this statement and return it to my office no later than 12:00 p.m., March 2nd, 1970." On March 2, the Union held a meeting to discuss the letter. The meeting was attended by most of the barbers then working including barbers then working for Roscoe and Fisher.

²² The concessionaire agreement signed by Fowler required him to give first consideration to the employment of employees of the previous concessionaire. Through the years, the practice and custom at Fort Bragg was for barbers to continue working despite the numerous changes in concessionaires.

At this meeting the barbers voted not to sign the individual form-letter contracts, to withhold their services, and to picket the base. The next day a majority of the barbers on the base failed to report to work for Fowler and instituted a picket line. The record clearly reveals that the barbers refused to report to work because Fowler insisted on dealing with them individually and not through the Union. On March 3, 18 former Spruce Up barbers reported to work along with 3 other barbers. Other former Spruce Up barbers reported to work at various times thereafter and, on May 28, the Union sent Fowler a letter on behalf of 22 named barbers, including 4 barbers who had worked for Roscoe and Fisher, containing an unconditional "offer to return to work for you at Fort Bragg." Fowler did not reply to the letter, and none of these were hired, except for two who had already reported for work before the letter was sent. Fowler testified that his reason for not hiring them was that "they had not come to him personally and requested their jobs back," and "that there was nobody refused" who came to him personally and asked for employment.

As indicated, on March 3, Fowler's work force in the former Spruce Up shops consisted of 18 former Spruce Up employees and 3 other barbers. Thereafter, on March 10, the figures were 19 former Spruce Up employees and 17 other barbers;²³ on March 17, 22 former Spruce Up employees and 26 other barbers;²⁴ on March 24, 20 former Spruce Up barbers and 28 new barbers;²⁵ on March 31, 21 former Spruce Up employees and 26 new

²³ For all shops the figures are: Spruce-Up barbers—20; new barbers—17, Roscoe barbers—0, Fisher barbers—0.

²⁴ For all shops the figures are: Spruce Up barbers, 23; new barbers, 27; Roscoe barbers, 0; Fisher barbers, 0.

²⁵ For all shops the figures are: Spruce Up barbers, 21; new barbers, 28; Roscoe barbers, 1; Fisher barbers, 0.

barbers;²⁶ on April 7, 23 former Spruce Up employees and 25 new barbers;²⁷ and on April 14, 32 former Spruce Up employees and 23 new barbers.²⁸ Continually thereafter, former Spruce Up employees outnumbered other barbers; on May 28, the ratio was 34 former Spruce Up employees to 18 new barbers²⁹ and by December 4, the comparable figures were 32 to 7.³⁰ At all times, the former Spruce Up employees constituted the stable nucleus of the employment force as the record shows that there was constant turnover among the non-Spruce Up barbers, with many of them remaining on the payroll for only a matter of days.

It is on the basis of these facts that we must determine (1) whether Respondent Fowler succeeded to Respondent Spruce Up's bargaining obligation on and after March 3, 1970, when it commenced operating the barber shops at Fort Bragg, and (2) whether Respondent Fowler violated Section 8(a) (5) and (1) of the Act by failing and refusing to bargain with the Union concerning the fixing of the terms and conditions of employment which were to obtain upon the commencement of operations.

Although it is apparent that an affirmative answer to the second question would afford substantial support for an affirmative answer to the first, I do not believe the converse is true; that is, I believe the successorship of Fowler has been established on this record without re-

²⁶ For all shops the figures are: Spruce Up barbers, 22; new barbers, 26; Roscoe barbers, 1; Fisher barbers, 0.

²⁷ For all shops the figures are: Spruce Up barbers, 25; new barbers, 25; Roscoe barbers, 3; Fisher barbers, 3.

²⁸ For all shops the figures are: Spruce Up barbers, 36; new barbers, 25; Roscoe barbers, 3; Fisher barbers, 4.

²⁹ For all shops the figures are: Spruce Up barbers, 36; new barbers, 18; Roscoe barbers, 8; Fisher barbers, 7.

³⁰ For all shops the figures are: Spruce Up barbers, 34; new barbers, 7; Roscoe barbers, 8; Fisher barbers, 7.

gard to how one determines the pretakeover bargaining issue, and I shall treat that issue first.

I am satisfied that a realistic appraisal of the foregoing evidence demonstrates that at all times material herein Respondent Fowler intended to rely, and did in fact rely, on former Spruce Up employees to staff his barber shops.³¹ As such employees, at all times after March 3, constituted the stable nucleus of his employment force, constituting a majority of such force at most times including the first 2 weeks of operations and at all times after April 14, I find that Fowler was a successor to Spruce Up and succeeded to the latter's bargaining obligation under the certification on and after March 3, 1970,³² and that he violated Section 8(a) (5) by failing, and refusing to recognize and bargain with the Union pursuant to its demand of February 26 which demand, the record reflects, continued in effect thereafter.

I cannot agree with the Chairman and Member Jenkins that Fowler did not succeed to Spruce Up's bargaining obligation until April 14, the date Fowler had hired a majority (32 of 55) of former Spruce Up employees. Successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the

³¹ Thus, Fowler not only assured the Union that "all the barbers who are working will work," he offered each barber employment; and though the offer seemingly set a deadline for acceptance by noon on March 2, Fowler continued to treat it as a valid outstanding offer by employing Spruce Up employees who initially refused to report, but later gave up their protest of his refusal to negotiate with the Union and indicated, on the record, that even as late as May 28, he would have accepted personal unconditional offers to return to work.

³² *Polytech, Incorporation*, 186 NLRB 984.

bargaining unit.³³ In making that determination, the question of whether employees of the predecessor actually predominate over other employees can hardly be the acid test of successorship, although it may be an important factor in determining whether the successor employer has a basis for doubting the Union's majority status. Here, of course, Fowler began operations with a work force in which former Spruce Up employees were in the majority for the first 2 weeks of operations. During the next 4 weeks of operations, there were fluctuations in the employment force resulting in a slight numerical minority of former Spruce Up employees, and then a further fluctuation after April 14 bringing them back into a majority of the work force. One can not realistically say that these fluctuations changed the character or nature of the employing industry. The fact is that the former Spruce Up employees did constitute the stable nucleus of Fowler's employment force, as the Board previously found and Fowler did continue to look to such employees for his permanent work force to perform the same operations in the same locations as they did for Spruce Up. There is nothing in the *Burns* decision to require a different result now of this aspect of the case,³⁴ and, accordingly, I reaffirm

³³ *N.L.R.B. v. Polytech, Incorporation*, 469 F.2d 1226, enfg. 186 NLRB 984. Here, of course, if a successorship was established as of March 3, the Union's majority status would not be subject to question during the remainder of the certification year.

³⁴ I do not regard the fact that Fowler is the operator of all 27 barber shops on the base, whereas Spruce Up operated only 19, as destroying the vitality of the certification of the Union as the exclusive representative of an appropriate unit of all barbers employed by Fowler. The additional shops simply amount to an expansion of the bargaining unit during the certification year. Assuming, *arguendo*, that such expansion might have afforded Fowler a basis for doubting the Union's majority status in the expanded unit, Fowler does not appear to have raised that defense herein. In any event, the record discloses that even considering all the shops operated by Fowler, Fowler commenced operations with a work force in which Spruce Up barbers constituted a majority, that Spruce Up barbers at all times constituted the stable

the original decision in this respect.³⁵

On the question of whether Respondent Fowler was obligated to bargain with the Union over the fixing of his initial terms and conditions of employment, it seems to me entirely clear that Respondent Fowler did plan to retain the former Spruce Up employees. He not only told the Union that "all barbers who are now working, will work," he offered each of those barbers employment. He hired all those who reported for work on March 3, and those who thereafter crossed the picket line. Had each of those barbers reported for work on March 3, there can be no doubt but that Fowler would have put them all to work. Surely, an employer who offers employment to all the employees of a predecessor "clearly plans to retain all of the employees in the unit. . . ." The fact that some employees may refuse the offer of em-

nucleus of his work force and a clear majority of the force when his operations stabilized. Moreover, the barbers employed by Roscoe and Fisher attended and participated in the union meeting of March 2, and they joined with Spruce Up barbers in refusing to report for work on March 3, though by May 15, 8 of 10 Roscoe barbers had reported for work and by April 21, 7 of 13 Fisher barbers had done so. The record demonstrates that Roscoe and Fisher barbers intended to and did make common cause with the Spruce Up barbers in refusing to report to work on March 3 because of Fowler's refusal to bargain with the Union, and that Fowler was aware of that fact, having been advised by the Union that it was representing those barbers also pursuant to individual authorizations and requests to do so. It seems clear to me, therefore, that Roscoe and Fisher shops merged with the Spruce Up shops to form an expanded bargaining unit and that the principals on either side of this labor dispute so viewed the matter and acted at all times in accordance with that view. Accordingly, for all the foregoing reasons, I find that the Union's certification as the exclusive representative of all barbers employed by Respondent Spruce Up survived the change in concessionaires and retained its vitality as to the expanded unit of barbers employed by Respondent Fowler. *N.L.R.B. v. J. W. Rex Co.*, 243 F.2d 356 (C.A. 3), enfg. 115 NLRB 775.

³⁵ For reasons stated by Member Penello, the statement in fn. 6 of the decision in *Golden State Bottling Co. v. N.L.R.B.* U.S. (1973), does not require a different result.

ployment has nothing to do with the "plans" or intent of the offering employer. It may be that he will have to alter his plans, if the employees refuse the offer of employment, but at the time of the offer, he assuredly plans to retain those employees. Where such is the case, and where the union representing those employees has made an appropriate bargaining demand, I agree with Member Penello that under *Burns* the successor is obligated to consult with the union "before he fixes terms." Construing the term "fixes" in this context as the actual establishment of those terms on the day the successor commences operations, as the *Burns* decision seems to require, would eliminate the fears of the majority that successor employers would lose the right to use their own business judgment in the establishment of initial terms and conditions of employment, were they to comment favorably upon the employment prospects of the predecessors' employees. For as the Court explicitly noted with respect to *Burns* in an obvious effort to delineate the bargaining obligation arising under its "clearly plans to retain" test,

Here, for example, *Burns'* obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that *Burns* refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that *Burns* ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. *If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had*

*made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice.*³⁶ [Emphasis supplied.]

Inasmuch as *Burns* had completed its hiring process sometime in June and as that hiring process consisted of offers of employment at terms and conditions of employment established unilaterally by *Burns*, the Court's indication that the bargaining obligation had then become apparent, and would have been enforceable by timely demand for bargaining by the union³⁷ so as to require good-faith bargaining over the terms and conditions of employment already offered by *Burns* and accepted by the employees, necessarily means that under the "clearly plans to retain" test, it is the successor's intention to hire, not its determination of the terms under which it will hire, that determines whether or not he must honor a timely demand for bargaining prior to the commencement of operations. Nor can there be any economic injury to the successor in bargaining in good faith prior to the commencement of operations, for, assuming good-faith bargaining on his part, if the union can not persuade him that other terms are more equitable, he is perfectly free to impose those terms as the opening terms and conditions of employment upon the commencement of operations.

The majority's contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the

³⁶ *Burns*, *supra* at 295.

³⁷ The union did not demand bargaining before operations commenced but waited until July 12.

former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear "the mediatory influence of negotiation"³⁸ where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end. For it is apparent, from the whole sequence of events in this case, that once Respondent Fowler had determined to rely on Spruce Up employees to operate his shops, the bone of contention between him and those employees was his refusal to deal with them through their Union. When Fowler informed the Union that "all the barbers who are not working will work," almost a month remained before he was to take over the operation of the barber shops. Had he honored the Union's request to bargain over the change in commission rates he intended to make, the negotiation process would have had time to work out an acceptable agreement without danger of work stoppages during that process. Had good-faith efforts failed to result in agreement in such circumstances, Fowler would have been free to initiate the offered terms as his opening terms. The decision of employees to work or to withhold their services would then have been made in the light of Fowler's good-faith dealing with their Union and vindication of their exercise of Section 7 rights, not in the light of an adamant denial of such rights.

Accordingly, for these reasons and those stated by Member Penello, I join him in finding that Respondent Fowler violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain on and after February

³⁸ "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211.

6, 1970, with the Union over the fixing of the initial terms and conditions of employment, and in dealing directly with employees as to such matters on February 27, 1970.

The remedy for this violation poses some difficulties. On the one hand, *Burns* holds that the terms and conditions of employment afforded by the predecessor are not to be regarded as those of the successor, who has the right to establish his own terms. Fowler's exercise of the right to establish his own terms did not, however, carry with it the right to refuse the Union's timely demand to negotiate concerning those terms. One can not know with any certainty whether negotiations over the terms would have resulted in changes therein. I believe, however, that the record affords a basis for concluding that, had such negotiations been conducted in good faith, the Spruce Up barbers would have reported to work even at Fowler's terms and worked thereunder pending conclusion of collective bargaining, for the record clearly reveals that those employees' reason for failing to report to work under those terms was Fowler's refusal to bargain with the Union concerning them. In these circumstances, and as Fowler was obviously willing at all times to hire them at such terms, I believe the appropriate remedy for his refusal to negotiate with the Union is to require him to honor the employees' unconditional offer to report to work made through their Union on May 28, 1970, replacing if necessary those barbers not employed in the bargaining unit prior to March 3, and to make them whole by payments based on his commission rate structure for loss of wages from 5 days after May 28 until such time as he offers them employment. I would, of course, also include in the Order appropriate cease-and-desist and affirmative bargaining provisions to remedy the violations of Section 8(a)(5) I find to have occurred herein. Accordingly, I join in the Order issued by

Chairman Miller and Member Jenkins to the extent it provides the relief indicated above.

Dated, Washington, D.C. Feb. 22, 1974

/s/ John H. Fanning
JOHN H. FANNING Member
NATIONAL LABOR RELATIONS BOARD

MEMBER PENELLO, dissenting in part, concurring in part:

Contrary to the majority, I believe that a proper application of the principles enunciated by the Supreme Court in *Burns* requires a finding that Respondent Fowler's conduct in refusing to bargain with the Union prior to establishing his commission rates initially, and in bypassing the Union and dealing directly with the barbers as individuals, violated Section 8(a)(5) and (1) of the Act. In *Burns*, the Court held that in general a successor is free to set the initial conditions of employment upon which rehiring is conditioned without bargaining with the Union, since prior to hiring a substantial proportion of his predecessor's employees it will not be clear that he has a duty to bargain with the Union. The only instance in which the duty to bargain may precede the formal rehiring of employees is where, as *Burns* states, "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."³⁹ This is such a case.

The facts in this case are not disputed. The majority agree that Fowler told the Union on February 6, 1970,⁴⁰ when asked what his intentions were about hiring barbers, "All the barbers who are working will work." However, by strained legal psychoanalysis, they contend that, despite the plain meaning of his words, Fowler did not really intend to retain the barbers.

Intent is the state of mind with which an act is done. It is rarely susceptible of direct proof, but must ordinarily be inferred from the surrounding facts. Here, we have the rare instance in which direct evidence is available,

³⁹ *Burns, supra* at 294-295.

⁴⁰ All dates hereinafter are in 1970.

for the facts show that Fowler specifically stated that he wanted to retain the employees by his own words on February 6. He communicated this desire to the employees by individual form letters subsequently. Most importantly, his voiced intent to retain these barbers eventually became a reality when they made up the majority of his work force.

This analysis is consistent with the exact language of the Court in *Burns* and is the only approach that gives those words any significance. The Court there said nothing about a conditional intent to hire. The majority are attempting to revise substantially what the Court said, for their view would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he "plans" to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity.

The majority opinion expresses great concern that this position will have the undesirable result of discouraging new employers "from commenting favorably at all upon employment prospects of old employees for fear [they] would thereby forfeit [the] right to unilaterally set initial terms" However, they seriously misread the *Burns* decision by even suggesting such a consequence. The Court in *Burns* did not forbid any successor from setting initial terms on its own once it announces it intends to retain its predecessor's employees. The Court merely said that in this situation "it will be appropriate to have [the new employer] initially consult with the employees' bargaining representative *before* he fixes terms."

(Emphasis supplied.) I regard this duty as merely an obligation to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse.⁴¹

Having thus negotiated with the union, the successor is then free to fix his terms whether the union agrees or not. In my view this is not too heavy a burden to put on any employer in order to protect the employees' Section 7 rights "to bargain collectively through representatives of their own choosing" with respect to matters affecting the employees' interests. Certainly, to avoid the whole impact of *Burns* any "well-advised" employer could refuse ever to take over any employees of the predecessor and thus it would never become a successor within the meaning of the Act as this Board has defined successorship. However, such refusal to employ the existing complement has not occurred to my knowledge judging by the number of cases in which the Board has found a new employer to be a "successor" and will not occur as long as many purchasers as a practical matter need the experienced employees of their predecessor to continue the business successfully.

Contrary to the majority, I believe that the present case is analogous to *Howard Johnson Company*, 198 NLRB No. 98, a case that the majority agrees with me fell within the *Burns* proviso, the only difference being that there the employer had already taken over the company and here the discussion with the Union was in

⁴¹ Certainly it is well established that after an impasse is reached, an employer is then free to make unilateral changes in working conditions consistent with his rejected offer to the union. *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225; *N.L.R.B. v. Almeida Bus Lines, Inc.*, 333 F.2d 729 (C.A. 1); *N.L.R.B. v. Tex-Tan, Inc.*, 318 F.2d 472 (C.A. 5); *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.2d 144 (C.A. 7); *N.L.R.B. v. Landis Tool Company*, 193 F.2d 279 (C.A. 3).

advance of takeover. There, the successor at the time of his takeover announced his wages and employee benefits, which were different from those of the predecessor, at the same time that he reassured the employees of their job. Yet, the Board did not there find that the intention to retain the employees was "conditional" upon their acceptance of the new conditions, despite the fact that under the logic of the majority, had any employees objected to the successor's terms and conditions, the successor would certainly not have retained these employees on their own terms.

Moreover, my interpretation of the Court's language in *Burns* accords with the Board's decision in *Chemrock Corporation*, 151 NLRB 1074, where the Board considered the same question of whether a purchaser is obligated to bargain with the union representing its predecessor's employees before it has hired them and concluded in the affirmative.

In *Chemrock*, a newly formed company purchased a growing plant during the term of the seller's contract with the union as representative of his truckdrivers. Although the purchaser continued operations of the plant without change and with the same production employees, it informed the drivers that it would deal with them only as "free agents" on an individual basis at a wage rate below the contract rate. When the truckdrivers told the employer to discuss the matter with the union it refused to do so, hired new truckdrivers, and thereafter refused to deal further with the former drivers. The Board held that the drivers were employees of the purchaser even though they had not been hired by the purchaser, and thus the purchaser was obligated to bargain with their union. In reaching this conclusion the Board was guided by the decisions of the Supreme Court in *Phelps-Dodge*⁴²

⁴² *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177.

and *Hearst Publications*⁴³ holding that the term "employee" must be given a broad meaning in keeping with the statute's broad terms and purposes. The Board in *Chemrock* stated that where:

... the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as "employees" of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment The particular individuals involved here were unquestionably "employees" of the enterprise at the time of the transfer of plant ownership. The work they had been doing was to be continued without change. Clearly employees in such a situation are entitled to seek through bargaining to protect their economic relationship to the enterprise that employs them.⁴⁴

The Board also observed in that case that the following language in the Supreme Court's opinion in *Wiley*⁴⁵ was pertinent to the issue:

Employees and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main

⁴³ *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111.

⁴⁴ *Chemrock*, *supra* at 1078.

⁴⁵ *John Wiley & Sons v. Livingston*, 376 U.S. 543.

considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship⁴⁶

In addition, the Board found an independent 8(a)(1) violation in the successor's bypassing the Union and dealing directly with the individual employees:⁴⁷

. . . As has been shown above, during the interim period between the time it contracted for the purchase of the plant and the time it took physical possession, Respondent, deliberately bypassing the Union, entered into direct dealings with the drivers concerning their continued tenure of employment and the terms and conditions of such continued employment. It is undisputed that the Union at least during that period still retained its statutory status as the employees' duly designated bargaining agent in an appropriate unit. Section 7 of the Act guarantees employees the right, *inter alia*, "to bargain collectively through representatives of their own choosing" with respect to matters affecting their employee interests. And that right, in turn, exacts a correlative obligation from one who would deal with represented employees as to such matters to deal with them through their statutory representative and not directly.

This cogent analysis applies with equal force to the case at bar. Thus, on February 6 when Respondent Fowler first manifested an intent to hire all of the employees in the unit, he became obligated to bargain with the Union prior to establishing his commission rates.

⁴⁶ *Wiley, supra* at 549, quoted in *Chemrock, supra* at 1078-79.

⁴⁷ *Chemrock, supra* at 1080-81.

His refusal to do so constituted a violation of Section 8(a)(5).⁴⁸ Similarly, it is quite clear that when Respondent Fowler sent a letter to each of the barbers on February 27 setting out the new commission rates which he intended to pay and requesting any barber who desired to work for him under those conditions to indicate his intention of doing so by signing and returning the letter, he was acting in an employer capacity and dealing with them individually about matters as to the negotiation of which the employees had a legitimate right and interest to be represented by their bargaining agent, and concerning which the Union had sought bargaining on two occasions. Respondent Fowler's insistence upon bypassing the Union and dealing with the employees directly, in my view, was a clear infringement of the employees' Section 7 rights, and as such was violative of Section 8(a)(1).

Accordingly, I find that the former Spruce Up employees who concertedly refused to work for Respondent Fowler on or about March 3 did so because of Fowler's

⁴⁸ In light of my view that the bargaining obligation of Fowler commenced on February 6, 1970, I do not find it necessary to reach the unit issue. In any event, however, I share the view of Member Fanning that the addition of eight shops to the unit did not substantially change the essential nature of the unit as it constituted only "an expansion of the bargaining unit." I also subscribe to Member Fanning's view that only "a legally significant portion of the successor's employment force" must consist of employees previously employed in the bargaining unit, and that Fowler was a successor to Spruce Up as of March 3, 1970, because "Fowler commenced operations with a work force in which Spruce Up barbers constituted a majority [and] Spruce Up barbers at all times constituted the stable nucleus of his work force and a clear majority of the force when his operations stabilized." I do not think that Chairman Miller and Members Jenkins and Kennedy can derive much support from *Golden State, supra*, which deals with the circumstances in which a successor will be required to bargain to remedy the refusal to bargain of his predecessor. The Court therein was not speaking to a case where the employing industry survived the change in ownership so as to impose a bargaining obligation upon the successor.

unlawful conduct in refusing to recognize and bargain with the Union, bypassing the Union, and dealing directly with the barbers as individuals regarding the barbers' terms and conditions of employment. I thus find them to be unfair labor practice strikers who were entitled to reinstatement to their former positions or, if those positions were no longer available, to equivalent positions, at the time Respondent Fowler received their unconditional offer to return to work on May 28, replacing, if necessary, those employees who were hired in the unit after March 3. For the reasons set forth in our original decision herein, I would order Respondent Fowler to pay backpay to the unfair labor practice strikers based on either the rate-price structure prevailing under Spruce Up, or the new rate-price structure established by Respondent Fowler, whichever results in the higher backpay to the individual employees.

Dated, Washington, D.C., Feb. 22, 1974.

/s/ John A. Penello
JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD